Supreme Court, U.S.
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No.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1995

ROBERT COUCH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, consistent with harmless-error analysis under *Chapman v. California* and its progeny, a court of appeals may shift the burden of proof from the government to the appellant to prove that wrongfully excluded exculpatory evidence would have constituted a complete defense to the crimes charged.

2. Whether, consistent with *Chapman v. California*, which requires reversal unless error is harmless beyond a reasonable doubt, a court of appeals may elevate the harmless-error standard to require a reversal only if wrongfully excluded exculpatory evidence would have been a complete defense to the crimes charged.

3. Whether a jury instruction governing a jury's consideration of the use of force by a police officer criminally charged with a violation of 18 U.S.C. § 242 must include language from *Graham v. Connor* that "the calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments–in circumstances that are tense, uncertain, and rapidly evolving–about the use of force that is necessary in a particular situation."

4. Should certiorari be granted to resolve the sharp conflict among federal courts of appeals in essential approach to reviewing departures under Federal Sentencing Guidelines, and in correct analysis of particular categories of downward departure involved in this case.

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

ROBERT COUCH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit in Case No. 94-3292, (App. A, p. 1a), is unreported. The opinion of the United States District Court for the Southern District of Ohio, (App. B, p. 21a), is unreported.

JURISDICTION

The judgment of the Sixth Circuit Court of Appeals was entered on June 20, 1995. Petitioner filed a petition for rehearing pursuant to Fed. R. App. P. 40 on June 30, 1995. The Sixth Circuit entered an order denying the petition for rehearing on July 25, 1995. This Court has jurisdiction to review the judgment of the Sixth Circuit by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. CONST. amend. V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

1. 18 U.S.C. § 242

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more

than one year, or both, and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or life, or both, or may be sentenced to death.

2. FED. R. CRIM. P. 52

(a) HARMLESS ERROR. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) PLAIN ERROR. Plain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

3. *Federal Sentencing Guidelines Manual*, (1988 Ed.) § 5K2.0

Grounds for Departure (Policy Statement) (See App. F, p. 48a).

STATEMENT OF THE CASE

At approximately 1:33 a.m. on August 12, 1989, David Boss, the dispatcher on duty in the Covington, Kentucky, Police Department, received a call from Covington Police Officer Donald Andrews indicating that Officer Andrews was in pursuit of a vehicle on East Fifth Street in Covington. Before calling the dispatcher, Officer Andrews had observed a pickup truck travelling at a high rate of speed in the high speed lane on Interstate Highway 75. Officer Andrews, who was entering the highway, attempted to catch up with the pickup truck in order to gauge its speed. He clocked the truck at over 95 miles per hour. The driver of the pickup truck was later identified as Larry Overbey.

Larry Overbey had been drinking in a bar in Florence, Kentucky, south of Covington, before he entered northbound Interstate 75 in his pickup truck. He was depressed over the break-up of his relationship with his fiancee. As he approached the crest of that portion of the interstate known as "Death Hill," he became increasingly upset and began to accelerate. He felt that nothing seemed to matter to him anymore. Later that evening Mr. Overbey told Laura McIntosh, the nurse on duty at the Hamilton, County, Ohio, Justice Center, that he was trying to kill himself by wrecking his truck.

Upon seeing Officer Andrews, Mr. Overbey began to accelerate away from Officer Andrews' vehicle, left the high speed lane of the interstate at a high rate of speed, crossed three lanes of traffic, and exited the interstate at the eastbound Fifth Street exit in Covington. Officer Andrews observed the pickup truck speed through the streets of Covington, which were crowded with pedestrians and vehicular traffic, and careen through the

crowded parking lots of two gas stations. Mr. Overbey disobeyed Officer Andrews' attempts to signal him to stop. Officer Andrews observed Mr. Overbey's truck as it turned into on-coming traffic before re-entering the interstate at the Fourth Street entrance ramp. Officer Andrews pursued the pickup truck in his cruiser back onto the interstate heading northbound until the pickup pulled over just past the Linn Street/River Road exit on the Ohio side of the Ohio River. Three or four other police cruisers had joined the pursuit by the time the pickup truck came to a stop.

Officer Robert Couch was on duty near the intersection of Sixth and Main Streets in Covington, Kentucky when Dispatcher Boss received Officer Andrews' call. Officer Couch heard Officer Andrews reporting to the dispatcher that he (Andrews) was exiting Interstate 75 at Fifth Street, which was two or three blocks from Officer Couch's location. Officer Couch entered his cruiser to go to Officer Andrews' assistance. As he proceeded north in pursuit of Officer Andrews and Mr. Overbey, Officer Couch observed a cruiser or cruisers stopped at the River Road/Linn Street exit ramp on the Cincinnati side of the river. He pulled over and parked behind another cruiser. As he was pulling to a stop, Officer Couch observed Officer Andrews standing outside a large pickup truck and observed the suspect (Larry Overbey) standing next to the officer. Officer Couch exited his cruiser and moved quickly toward the pickup truck. Officer Couch then observed Mr. Overbey "make some kind of a move" toward Officer Andrews, who had his gun unholstered. Officer Andrews and Mr. Overbey began to struggle and Officer Couch quickly moved to assist Officer Andrews, fearing that Mr. Overbey might gain control of the weapon.

Officer Couch heard Officer Andrews shout "grab him!" and Officer Couch reached out toward Mr. Overbey. When he did so, he was hit in the chest and knocked backwards, landing on his right forearm. Officer Couch jumped up. He noticed that Officer Andrews still had his gun unholstered. Officer Couch then took his metal service flashlight and struck Mr. Overbey somewhere on his body. At the same time, Officer Couch was able to grab Mr. Overbey's arm and they both fell to the ground. Officer Couch reached for his handcuffs and was able to place one handcuff on Mr. Overbey. Officer Couch, in concert with other officers, was eventually able to successfully complete the handcuffing of Mr. Overbey. This process took just a few short seconds.

The process of subduing Larry Overbey following the high-speed chase lasted no more than three or four seconds. Several officers other than Officers Andrews and Couch were involved in securing Mr. Overbey. Their involvement was necessitated by Mr. Overbey's conduct. Officer Brett Tate, who arrived on the scene after Officers Couch and Andrews, saw Mr. Overbey "trying to get away from them, trying to keep from being grasped for handcuffing." Officer Tate described Mr. Overbey as "uncooperative" and "out of control" when he (Officer Tate) arrived on the scene. Officer Andrews believed that Mr. Overbey was resisting arrest. Officer Andrews estimated that the group of officers involved in this incident inflicted ten or twelve blows upon Mr. Overbey with flashlights or (in Officer Andrews' own case) with the butt of a gun and a blackjack.

Officer Andrews struck Mr. Overbey twice with the butt of his gun and once with his blackjack. He then sprayed mace into Mr. Overbey's face as he was

completing the process of handcuffing Mr. Overbey. Two officers other than Officer Andrews and Officer Couch also struck Mr. Overbey. Officer Andrews testified at trial that he could not identify those other officers. Although Officer Andrews testified that he saw Officer Couch strike two or three blows to the right side of Mr. Overbey's head, only one other witness testified that Officer Couch struck Mr. Overbey in any fashion. Larry Overbey was unable to identify any of the officers who struck him.

After he was apprehended, Larry Overbey was arrested and an ambulance was called to take him to Good Samaritan Hospital in Cincinnati for treatment of his injuries. While he was being placed in the ambulance, Mr. Overbey ridiculed Officer Andrews for Officer Andrew's inability to keep up with his pickup truck. Mr. Overbey was examined in the hospital emergency room by Dr. Steven Gunderson. Dr. Gunderson noted multiple lacerations in Mr. Overbey's scalp and welts on Mr. Overbey's back. The physical examination revealed no evidence of head injuries severe enough to alter Mr. Overbey's orientation to place, time, or to his own identity. Mr. Overbey's neurological exam, and the examinations of his spine, heart rate, lungs and ears were all normal, as were the x-rays taken of Mr. Overbey's head, shoulder, ribs and spine. Mr. Overbey's mental faculties were not impaired in any way, and Dr. Gunderson prescribed medication of a strength similar to the over-the-counter drug Motrin. The lacerations to Mr. Overbey's head were treated by stitching. Mr. Overbey was then released from the hospital and transported to the Hamilton County, Ohio, Justice Center in Cincinnati.

While Larry Overbey was being transported to the hospital, Officer Couch, as instructed by his superior officer, traveled to the Hamilton County Justice Center to sign affidavits in support of state charges against Mr. Overbey for assault and resisting arrest. Officer Couch then returned to his normal patrol duties.

In proceedings before the Hamilton County Municipal Court on October 26, 1989, stemming from the charges filed against him based upon Officer Couch's affidavits, Larry Overbey entered a plea of no contest to the amended charge of attempted assault, a misdemeanor.

On March 3, 1993, Officers Robert Couch and Michael Kraft were indicted on one count of violating the civil rights of Larry Overbey, in connection with Mr. Overbey's arrest, in violation of 18 U.S.C. § 242. Count one of the indictment specifically charged that Officers Couch and Kraft used unreasonable force against Mr. Overbey in effectuating his arrest, thereby violating Mr. Overbey's right not to be deprived of his liberty without due process of law. Count two of the indictment charged Officer Couch with violating Mr. Overbey's civil rights by filing a false state charge of resisting arrest against Mr. Overbey. On March 15, 1993, Officer Couch entered a plea of not guilty to both counts of the indictment. On April 7, 1993, the government filed a superseding indictment. The superseding indictment differed from the first indictment in that it charged in count two that Officer Couch violated Mr. Overbey's civil rights by filing false state charges of both assault and resisting arrest against Mr. Overbey. Officer Couch entered a plea of not guilty to both counts of the superseding indictment.

The trial in this matter commenced on June 28, 1993, and continued for eight days. The district court overruled Officer Couch's motions for judgment of acquittal at the close of the Government's case in chief and at the close of all the evidence. On July 9, 1993, the jury found Officer Couch guilty of both counts of the indictment and acquitted Officer Kraft of the charges against him.

On September 2, 1993, Officer Couch filed a motion for a new trial and renewed motion for judgment of acquittal on count two of the indictment. This motion was based, *inter alia*, on the ground that the district court's jury instructions on the use of force and on the import of Larry Overbey's plea of no contest to charges filed against him by Officer Couch denied Officer Couch his right to due process and a fair trial. Following evidentiary hearings on Officer Couch's motion held on November 23, 1993, and December 9, 1993, the district court overruled Officer Couch's motion. On February 28, 1994, the district court sentenced Officer Couch to a term of imprisonment of sixty-three (63) months on count one and twelve (12) months on count two, each term to run concurrently. Officer Couch filed a timely notice of appeal to the United States Court of Appeals for the Sixth Circuit on March 9, 1994.

On June 20, 1995, the Sixth Circuit entered judgment affirming the conviction and sentence imposed by the district court under count one of the indictment, reversing the conviction and sentence imposed under count two of the indictment, and remanding the cause to the district court for further proceedings. (App. A, p. 20a). In reversing the conviction and sentence imposed by the district court under count two of the indictment, the Sixth Circuit found that the district court erred in

refusing to allow the jury to consider Mr. Overbey's plea of no contest as an admission of the facts underlying the charges filed against him. Specifically, the court found that this error could not "be said to be harmless" and therefore warranted reversal "because the significance of the no contest plea goes to the heart of Couch's defense to the second count of the indictment . . . ." (App. A, p. 15a). As to Officer Couch's arguments that this error also deprived him of a fair trial with respect to count one of the indictment, the Sixth Circuit held in a footnote that "[b]ecause the admissions made by Overbey in the context of the no contest plea, if deemed conclusive by the jury, would not constitute a complete defense with respect to defendant's use of unreasonable force, reversal is not required as to the first count of the indictment." (App. A, p. 15a, fn. 6). In so holding, the Sixth Circuit refused to consider whether the jury's inability to consider Mr. Overbey's admissions affected or had a substantial influence on the outcome of the proceedings.

REASONS WHY THE PETITION SHOULD BE GRANTED

1. The Sixth Circuit Court of Appeals' decision has effectively shifted the harmless-error burden of proof from the government to the appellant in violation of *Chapman v. California* and its progeny, *O'Neal v. McAninch*, *United States v. Olano*, and *Brecht v. Abrahamson*.

This Court has interpreted Fed. R. Crim. P. 52(a) to require that when the district court commits error, the government has the burden of proving that the error is harmless. *O'Neal v. McAninch*, 115 S.Ct. 992, 998 (1995); *United States v. Olano*, 113 S.Ct. 1770, 1778 (1993); *Brecht v. Abrahamson*, 113 S.Ct. 1710, 1717-18 (1993); *Chapman v. California*, 386 U.S. 18, 24 (1967). To prove harmless error on direct appeal, the government must prove that the error was harmless beyond a reasonable doubt. *Brecht v. Abrahamson*, 113 S.Ct. at 1717. On collateral, habeas-corpus review, to prove the error was harmless, the government must prove that the error did not have a "substantial injurious affect" on the jury's verdict. *O'Neal v. McAninch*, 115 S.Ct. at 998; *Brecht v. Abrahamson*, 113 S.Ct. at 1716.

In *O'Neal v. McAninch*, this Court reversed the Sixth Circuit Court of Appeals when the Sixth Circuit attempted to place the burden of establishing that an error was not harmless on petitioners in habeas actions. *O'Neal v. McAninch*, 115 S.Ct. at 995, 999. That reversal was based on the rule that "the *Government* bears the burden of showing the *absence* of prejudice." *Id.*, citing *United States v. Olano*, 113 S.Ct. at 1778 (emphasis added). The harmless-error burden is contrasted to plain-error analysis in which the *appellant* is required to show the

presence of prejudice. *United States v. Olano*, 113 S.Ct. at 1778 (emphasis added).

In this case, the Sixth Circuit found that the district court committed reversible error as to count two of the indictment in failing to permit the jury to consider the evidence that Mr. Overbey had entered a no contest plea in the underlying criminal case. However, the court refused to reverse count one on this basis because the wrongfully excluded evidence would not have been a "complete defense" to the crime in that count. By ruling in this manner, the Sixth Circuit created a two-part test for the appellant to obtain reversal based upon the wrongful exclusion of evidence: (1) the appellant must prove that the exclusion of the evidence was error; and (2) the appellant must prove that the wrongfully excluded evidence would have been a complete defense to each crime charged. In effect, this ruling has shifted the burden of proof in harmless-error analysis from the government to the appellant. Here, as in *O'Neal v. McAninch*, the Sixth Circuit has again adopted the plain-error burden of proof for harmless-error analysis. The Sixth Circuit has required the *appellant* to show the *presence* of prejudice, instead of requiring the *government* to prove the *absence* of prejudice. In *O'Neal*, *Olano*, and *Brecht*, this Court expressly refused to put this burden on the appellant. Here, just as in *O'Neal*, this Court should reverse the Sixth Circuit Court of Appeals in order to enforce uniform and consistent application of the harmless-error doctrine established in *Chapman*.

2. **By requiring the defendant to prove that the wrongfully excluded exculpatory evidence would have been a complete defense to the remaining charges, the Sixth Circuit Court of Appeals' decision has substantially altered the Chapman v.**

California harmless-error standard, which requires courts of appeals to reverse unless an error is harmless beyond a reasonable doubt.

Not only did the Sixth Circuit shift the burden of proof in this case, but it elevated the harmless-error standard by refusing to reverse unless the wrongfully excluded evidence was a "complete defense" for Officer Couch. This decision impermissibly elevates the standard of appellate review beyond the *Chapman* harmless-error rule. *See, Chapman v. California*, 386 U.S. at 24. Under the *Chapman* standard, an error is harmless if it did not "affect" or have a "substantial influence" on the outcome of the proceedings. *United States v. Olano*, 113 S.Ct. at 1778; *Bank of Nova Scotia v. United States*, 487 U.S. 250, 256 (1988); *Kotteakos v. United States*, 328 U.S. 750, 758-59 (1946).

The facts of this case illustrate the distinction between an error that has a "substantial influence" on a verdict, and an error that denies a defendant of a "complete defense." First, the district court's instruction informing the jury that it could draw no inferences from the fact that Mr. Overbey pled no contest to attempted assault destroyed Officer Couch's defense that he was reacting to Mr. Overbey's assault and resistance to arrest. Officer Couch testified at trial that as he approached the scene, he found Officer Andrews, with his gun out, grappling with Mr. Overbey. Officer Couch further testified that he reached out to grab Mr. Overbey and was hit in the chest and knocked backward onto the ground. Officer Couch stated that he then jumped up from the ground and struck Mr. Overbey in the body with his flashlight. For his part, Mr. Overbey stated in contrast to his no contest plea–that he offered no physical resistance to any of the police officers and that when he was

approached by the officers he already had placed both his hands behind his head. The trial court's erroneous ruling prevented the jury from considering evidence, from Mr. Overbey's own mouth, that corroborated to a material degree Officer Couch's defense that he had struck Mr. Overbey only in response to Mr. Overbey's hostile actions toward him.

A second but equally compelling reason why the district court's erroneous instruction had a substantial influence on the outcome of the proceedings is that the district court's instruction to disregard Mr. Overbey's admission precluded the jury from meaningfully evaluating Officer Couch's reasonable use of force. The jury was told by the district court that in evaluating the reasonableness of the force applied by Officer Couch against Mr. Overbey, it could look to such factors as: (1) whether, at the time of his arrest, Mr. Overbey posed an immediate threat to the safety of the defendants or to the other officers; (2) whether Mr. Overbey was resisting arrest; (3) whether Mr. Overbey was restrained; (4) whether there was a need for the application of force; and (5) whether force was applied in good faith.

Evidence of Mr. Overbey's admission that he attempted to assault Officer Couch is material to virtually each and every one of those factors for reasonable force. Because, however, the jury was instructed not to consider the fact of Mr. Overbey's admission of his illegal actions toward Officer Couch, the jury was prevented from evaluating the incident in its true and complete factual context.

Finally, when the district court erroneously instructed the jury to ignore Mr. Overbey's admission that he had committed the crime of attempted assault, the

instruction had the effect of enhancing the credibility of Officer Andrews and Mr. Overbey and diminishing that of Officer Couch. Officer Andrews testified that he had hit Mr. Overbey on the head with the butt of his gun and with a blackjack. Officer Andrews testified, however, there was no factual basis for the criminal charges that Officer Couch lodged against Mr. Overbey. Officer Andrews additionally denied observing Mr. Overbey do anything to provoke Officer Couch's use of force. At trial Mr. Overbey also testified that he offered no physical resistance to any of the police officers.

In contrast to the testimony of Officer Andrews and Mr. Overbey, Officer Couch testified that Mr. Overbey hit him in the chest and knocked him backward onto the ground. Mr. Overbey's admission that he attempted to assault Officer Couch supplies powerful corroborating evidence of the veracity of the facts offered by Officer Couch. The government's case relied extensively on the credibility of Officer Andrews. If the district court had not deprived the jury of Mr. Overbey's admission, the jury would have been free to discredit all of the testimony of Mr. Overbey and Officer Andrews. Indeed had the jury been permitted to consider the substance of the wrongfully excluded evidence, the jury could have reasonably concluded, consistent with Officer Couch's testimony, that the blows to Mr. Overbey's head were delivered if not solely by Officer Andrews at least not by Officer Couch. Based on that fact, it is impossible on appeal for the government to prove that the wrongfully excluded exculpatory evidence did not "affect" or "substantially influence" the outcome of the case.

On appeal, however, the Sixth Circuit first shifted the burden of proof, then elevated the standard of review. By doing so, the Sixth Circuit ignored a

constitutional trial error that was not harmless. In doing that, the Sixth Circuit violated *Chapman v. California*, *O'Neal v. McAninch*, *Brecht v. Abrahamson*, *United States v. Olano*, as well as Fed. R. Crim. P. 52(a). This Court cured that identical error by the Sixth Circuit in *O'Neal v. McAninch*. It should do the same in this case.

3. **In order to ensure uniformity, consistency, and fairness throughout the federal judicial system, district courts must be directed to incorporate the express language of *Graham v. Connor* governing "the calculus of reasonableness" in all jury instructions involving prosecutions of law enforcement agents for the unreasonable use of force in violation of 18 U.S.C. § 242.**

In *Graham v. Connor*, this Court held that in determining the reasonableness of a particular use of force by a police officer, "[T]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments–in circumstances that are tense, uncertain, and rapidly evolving– about the amount of force that is necessary in a particular situation." 490 U.S. 386, 396-397 (1989). The ruling in *Graham* is a clear recognition by this Court that today's police officers are faced with unique difficulties and uncertainties that necessarily inform their work, including the use of force. That decision establishes, without condition or qualification, that a factfinder assessing the objective reasonableness of the use of force by a police officer in effecting an arrest ***must*** view the police officer's conduct through a prism which crystallizes the realities of modern-day police work. The context in which the Court held that a police officer's use of force must be scrutinized is a critical, if not the most critical, element of the legal standard for review of use of force

claims set forth in *Graham*. By reason of that ruling, a police officer's use of force in a particular situation cannot be fairly or fully considered within the parameters of the law unless the factfinder incorporates within the calculus of reasonableness the realities of modern-day police work expressly and purposefully spelled out in *Graham*.

Decisions from different circuits reflect that this Court's language in *Graham*, as it relates to the calculus of reasonableness governing the use of force by a police officer, has not been applied uniformly throughout the federal judicial system. *See, e.g., U.S. v. Schatzle*, 901 F.2d 252, 255 (2nd Cir. 1990) ("We cannot place the talismanic weight urged by Schatzle on *Graham's* exact wording and do not believe the district court needed to echo the opinion paragraph by paragraph to convey adequately its import to the jury"); *Fikes v. Cleghorn*, 47 F.3d 1011, 1014 (9th Cir. 1995) ("[W]e conclude that the district court did not abuse its discretion in giving a jury instruction that did not mention the three factors listed in *Graham*"). If federal courts are not required to hold that the specific language of *Graham* is an integral and indispensable component of the calculus of reasonableness in use of force cases prosecuted criminally under 18 U.S.C. § 242, the actions of police officers who are charged under that provision are subject to scrutiny by a jury without benefit of the clear, firm, and fair standard of analysis set forth by this Court.

More important, the failure of federal courts uniformly to fully adopt and apply the *Graham* calculus of reasonableness leaves police officers in the anomalous, if not precarious, position of having their actions resulting in the use of force in the performance of their duties judged by a harsher legal standard in criminal

prosecutions under 18 U.S.C. § 242 than that applied to the very same conduct in civil lawsuits. Indeed, it makes for little sense, and leads to less justice, for federal courts to permit jurors, who may have no first-hand knowledge of or personal familiarity with the realities of modern-day police work, to make critical decisions affecting a police officer's freedom in assessing actions taken in what are "often tense, uncertain, and rapidly evolving situations" without the full benefit of the *Graham* analysis while at the same time to require judges who view the same set of circumstances in civil actions, with significantly less drastic consequences to the police officers, to adhere strictly to the letter of the *Graham* decision. ("The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments–in circumstances that are tense, uncertain and rapidly evolving–about the amount of force that is necessary in a particular situation" *Graham*, 490 U.S. at 396-397 (emphasis added)). *See, e.g., Smith v. Freland*, 954 F.2d 343, 347 (6th Cir. 1992), *cert denied*, 112 U.S. 1954 (1992) (Sixth Circuit Court of Appeals affirmed summary judgment in favor of a police officer who fatally shot a motorist following a high-speed chase, stating, "Thus, under *Graham*, we must avoid substituting our personal notions of proper police procedures for instantaneous decisions of the officer at the scene"); *Lewis v. Jefferson County Police Dept.*, Case No. 93-6287 (6th Cir. Oct. 21, 1994), unpublished (citing to *Graham* and *Freland*. Sixth Circuit Court of Appeals affirmed a summary judgment in favor of a police officer who shot and killed a fleeing suspect following a five-second chase).

This case demonstrates the insufficiency of jury instructions in criminal prosecutions of police officers for the use of unreasonable force which do not include the complete text of this Court's opinion in *Graham* detailing

the factors to be considered by a factfinder in assessing the reasonableness of the use of force by a police officer in a given instance. The record in this case reflects precisely the situation for which the *Graham* calculus of reasonableness was carefully and clearly designed. In this situation, Mr. Overbey's arrest took place following a high-speed chase. The sequence of events beginning with Mr. Overbey's exit from his pick-up truck and ending with his arrest by the police officers who arrived at the scene was concluded within a matter of seconds. In the absence of a complete instruction containing the critical language governing the use of force by police officers set forth in *Graham*, the jury was not directed to accord Officer Couch the deference to the difficulties of police work to which he was entitled by reason of that decision.

All police officers who perform their duties in tense, uncertain, and rapidly evolving situations are entitled to have their actions considered in light of the realities of modern police work, regardless of whether their actions are judged in a criminal or civil context. As the Government has noted, "[P]rosecutions for the unreasonable use of force in violation of 18 U.S.C. § 242 unfortunately are not uncommon." Government's Motion to Publish Opinion, at 3; (App. H, p. 54a). To ensure that the *Graham* calculus of reasonableness governing the use of force is applied consistently and uniformly throughout the federal system, the decision of the Sixth Circuit Court of Appeals approving the district court's jury instruction in this case must be reversed and the lower courts directed to incorporate the applicable language from *Graham* in all jury instructions concerning the use of force by law enforcement agents.

4. In order to ensure uniformity, consistency, and fairness throughout the federal judicial system,

federal courts of appeals must uniformly review departures from the Federal Sentencing Guidelines and consistently analyze specific categories warranting departure.

Petitioner raises this issue so that it may be preserved and considered in light of this Court's decision to grant *certiorari* in *Powell v. U.S.*, Case No. 94-8842, reported in 58 Crim. L. Rep. (BNA) No. 1, at 3001-3002 (October 4, 1995).

In this case, Officer Couch moved for a downward departure from the Federal Sentencing Guidelines on the basis that (1) the victim's criminal behavior played a provocative role in the incident; (2) Officer Couch had been punished by the loss of his profession; (3) Officer Couch, as a former police officer, was susceptible to abuse by other inmates during his incarceration; and (4) there was no evidence that Officer Couch was violent, dangerous, or likely to engage in future criminal conduct. The district court refused to consider this motion and summarily denied it "in light of the facts of this case for which the jury found [Officer Couch] guilty on both counts." The Sixth Circuit likewise refused to consider this issue on appeal because it "does not review denial of a motion for downward departure as long as the sentence imposed was within the properly calculated guideline range." (App. A, p. 20a).

This case, as does *Powell v. U.S.*, presents this Court with an opportunity to supply guidance with respect to when and under what parameters a sentencing court may exercise discretion to depart downward as well as whether, and under what standards, a court of appeals may review the district court's decision granting or denying such departures.

CONCLUSION

For all the foregoing reasons, Petitioner Robert Couch urges this Court to grant his Petition and set this case for briefing and argument, or, in the alternative, to grant his Petition, enter summary reversal, and remand this case for further proceedings.

Respectfully submitted,

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APPENDIX A

NOT RECOMMENDED FOR PUBLICATION

FILED
JUNE 20, 1995
LEONARD GREEN,
Clerk

No. 94-3292

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	**ON APPEAL**
Plaintiff-Appellee,	)	FROM THE
	)	UNITED STATES
v.	)	DISTRICT COURT
	)	FOR THE
ROBERT COUCH,	)	SOUTHERN
	)	DISTRICT OF OHIO
Defendant-Appellant.	)	**OPINION**

BEFORE: NORRIS and DAUGHTREY, Circuit Judges; FEIKENS, Senior District Judge.*

* The Honorable John Feikens, United States Senior District Judge for the Eastern District of Michigan, sitting by designation.

ALAN E. NORRIS, Circuit Judge. Robert Couch, a former officer of the Covington, Kentucky police department, challenges his conviction for depriving Larry Overbey of his civil rights while acting under the color of law. A jury convicted Couch of first beating Overbey during the course of an arrest and then filing false criminal charges against him. On appeal, Couch raises numerous issues, most of which concern jury instructions and errors that the district court allegedly made in calculating his sentence.

I.

On August 12, 1992, Larry Overbey had been drinking in Florence, Kentucky, when he pulled his pickup truck onto the northbound lane of Interstate 75. He was traveling at a high rate of speed when Officer Donald Andrews of the Covington police attempted to pull him over. Rather than acquiesce, however, Overbey led the police on a chase, first through the streets of Covington, and finally across the Ohio River. By the time he was pulled over on I-75 in Cincinnati, numerous Covington patrol cars were involved, including that of defendant Couch and co-defendant Michael Kraft.[1]

According to his trial testimony, when he arrived on the scene Couch saw Officer Andrews and a suspect, later identified as Overbey, next to a pickup truck. Andrews had his gun drawn. As he approached, Couch saw Overbey "make some kind of move." After Andrews called for help, Couch reached out and tried to grab the suspect but was knocked backwards. He then "jumped

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[1] Kraft was later acquitted and is not party to this appeal.

up off the ground" and struck Overbey with his metal flashlight "somewhere in the body." With help from other officers, Couch was then able to handcuff Overbey. Only then did Couch notice that Overbey was bleeding from the head and "thought he must have hit his head on the pavement." However, he realized how the injury had been caused when he overheard Andrews tell another officer, "The guy got out of the truck and he fought with us, Sergeant. I had to hit him."

For his part, Andrews testified that he struck Overbey twice with the butt of his gun and then sprayed his face with mace as he was handcuffing him. He also saw Couch hit Overbey two or three times on the right side of the head with a flashlight while the latter was face-down on the ground. Although he could not identify the others, Andrews testified that, in addition to himself and Couch, two other officers struck the suspect.

No one disputes the entire incident took but a few seconds. However, there was conflicting testimony concerning whether Overbey offered any resistance or was struck gratuitously by Couch and other officers. Overbey testified that he was standing with his hands clasped behind his neck when an officer delivered an unprovoked blow to his head.

As the result of the beating, Overbey was taken to a hospital where he required fifty stitches and was given pain medication.

The same day, Couch filed a complaint in Hamilton County Municipal Court charging Overbey with

resisting arrest and assault.[2] Overbey eventually entered a no contest plea to a misdemeanor charge of attempted assault, which he maintained he did out of fear that he would otherwise go to jail.

A jury subsequently convicted Couch on two counts of violating Overbey's civil rights under color of law. 18 U.S.C. § 242. The district court sentenced him to sixty-three and twelve months' imprisonment, respectively, for each count, to be served concurrently, followed by two years' supervised release. It also ordered a payment of $714 in restitution to Overbey.

After the jury verdict, Andrews, who testified for the government, approached Lieutenant William Dorsey and indicated that he could identify the two main culprits involved in the arrest (both affiliated with the Covington police). This "new evidence" led Couch to file a motion for a new trial. After a two-day hearing on the matter, the district court denied the motion.

II.

A. Jury Instructions

Although jury instructions represent a question of law to be reviewed *de novo*, this circuit has made it clear that the charge must be reviewed as a whole to determine whether it "fairly and adequately submits the issues and applicable law to the jury." *United States v. Martin*, 740 F.2d 1352, 1361 (6th Cir. 1984). Thus, no single provision of the entire instruction can be read in

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[2] Couch testified that his sergeant instructed him to do so.

isolation. *United States v. Lee*, 991 F.2d 343, 350 (6th Cir. 1993) (citing *United States v. Horton*, 847 F.2d 313, 322 (6th Cir. 1988)).

1. Willfulness Instruction

Couch begins by taking issue with the trial court's instruction on willfulness. In its preliminary discussion of the elements required to convict under the statute,[3] the court described willfulness in the following terms:

> There must have been an intent on the part of the defendant to willfully subject the victim to the deprivation of the Constitutional right involved. That is, with respect to Count One, there must have been an intent on the part of the defendants to willfully subject Larry Overbey to the deprivation of his Constitutional right to be free from the intentional use of unreasonable force by a person acting under color of law.

This element was given full elaboration shortly thereafter:

> [A]n act is done willfully if it is done

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[3] Whoever, under color of any law . . . willfully subjects any inhabitant of any State . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if bodily injury results shall be fined under this title or imprisoned nor more than ten years, or both . . . .

18 U.S.C. § 242 (1988) (subsequently amended).

voluntarily and intentionally, and with the specific intent to do something the law forbids; that is, with an intent to violate a specific protected right. . . .

In the case of Count One of the indictment, it means with a specific intent to use more force than is reasonable under the circumstances. In the case of Count Two, it means with a specific intent to arrest the victim without probable cause to believe that the victim committed the crime charged.

. . .[I]ntent is a state of mind and can be proved by circumstantial evidence. . . .

You may infer that a person ordinarily intends all the natural and probably consequences of an act knowingly done. . . .

It is not necessary for you to find that the defendants were thinking in constitutional terms at the time of the incident, as a reckless disregard for a person's constitutional rights is evidence of a specific intent to deprive that person of those rights. You may find that a defendant acted with the requisite specific intent even if you find that he had no real familiarity with the Constitution or with the particular constitutional rights involved, provided that you find that the defendant willfully and consciously did the act which deprived the victim of his constitutional

> rights. Nor does it matter that the defendant may have been motivated by hatred, anger or revenge or some other emotion, provided that the intent which I have discussed is present.
>
> If you find that the defendants knew what they were doing and that they intended to do what they were doing, and if you find that what they did constituted a deprivation of a Constitutional right, then you may conclude that the defendants acted with the specific intent to deprive the victim of that constitutional right.

Couch argued during the charging conference that the jury should be told that the government must prove that he "not only had a generally bad or evil purpose, but also that he had the specific intent to deprive Larry Overbey of his federal constitutional rights."

Both sides look to *Screws v. United States*, 325 U.S. 91 (1945), for guidance. In *Screws*, the Court grappled with the problem that the statute did not provide the accused with sufficient notice of criminal conduct because constitutional concepts, such as due process, are notoriously protean. To save the statute from this infirmity, the Court noted that the term "willfully" was added in 1909, ostensibly to make the statute less severe:

> We think the inference is permissible that its severity was to be lessened by making it applicable only where the requisite bad purpose was present, thus requiring specific intent not only where discrimination is claimed but in other

> situations as well. We repeat that the presence of a bad purpose or evil intent alone may not be sufficient. We do say that a requirement of a specific intent to deprive a person of a federal right made definite by decision or other rule of law saves the Act from any charge of unconstitutionality on the grounds of vagueness.

Id. at 103. Couch reads *Screws* to stand for the proposition that violation of a federal right and the intent to violate that right are two separate elements of the crime. In his view, the instruction permitted the jury to find him guilty of violating Overbey's civil rights without finding that he consciously and intentionally used more force than was necessary to secure Overbey. In short, it is not enough that an officer objectively cross the line by using excessive force; he must know that he is doing so.

Although we do not quarrel with this construction of the law, the charge as given adequately conveyed that requirement. As long as the accused specifically intends to use more force than is reasonable under the circumstances, he acts willfully and thus runs afoul of § 242. *United States v. Reese*, 2 F.3d 870, 885 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 928 (1994). Furthermore, *Screws* recognizes that a defendant need not necessarily be "thinking in constitutional terms" if his aim was to deprive an individual of a constitutionally protected right. *Screws*, 325 U.S. at 106.

Thus, the mere intention to use force, which the jury later finds to have been unreasonable, would be insufficient to sustain a conviction under § 242. *Reese*, 2 F.3d at 885. Rather, Couch must have intended to use

unreasonable force, that is, he must have intended to deprive Overbey of his constitutionally protected right to be free from the use of unreasonable force.

Reviewing the jury instructions as a whole and paying particular attention to the trial court's instruction on willfulness, we conclude that the jury was "adequately and fairly" apprised of the intent necessary to establish criminal culpability under the statute. The trial court's willfulness instruction begins, "I instruct you that an act is done willfully if it is done voluntarily *and intentionally, and with the specific intent to do something which the law forbids; that is, with an intent to violate a specific protected right.*" (Emphasis added.) This language, coupled with the detailed charge cited earlier, more than satisfies the requirements developed in the relevant case law. No further instruction that the accused acted with "bad or evil intent" is necessary.

2. Reasonable Use of Force

Couch also questions the manner in which the district court instructed the jury about how to analyze a charge of excessive force. Although he concedes that the court's instruction was accurate insofar as it required the jury to apply an "objective reasonableness" test, *Graham v. Connor*, 490 U.S. 386, 388 (1989), he contends that the instruction proved inadequate because it did not explain that the jury should assess defendant's actions in light of the "difficulties of modern police work."

In support of his proposed instruction, which the district court declined to give, Couch notes that it tracks language found in *Graham*, 490 U.S. at 396, and *Smith v. Freland*, 954 F.2d 343, 346 (6th Cir.), *cert. denied*, 112 U.S. 1954 (1992).

However, as this court has held in the past, "a judge does not commit error because he or she fails to use language contained in a request, so long as the instruction given is accurate and sufficient." *United States v. Montgomery*, 980 F.2d 388, 393 (6th Cir. 1992). Here the court provided the following guidance to the jury:

> [Y]ou may look to such factors as the severity of the crime of which Larry Overbey was suspected at the time of his arrest; whether, at the time of his arrest, Mr. Overbey posed an immediate threat to the safety of the defendants or other police officers; whether, at the time of his arrest, Mr. Overbey was resisting arrest or attempting to evade arrest by flight; the need for the application of force, whether the victim was restrained; the victim's position in relation to where the defendants were located; the relationship between the need and the amount of force that was used; the extent of injury inflicted; the physical condition of the victim; and whether force was applied in good faith or for the very purpose of causing harm. You may also consider the character and duration of the alleged assault, and the manner in which the alleged assault occurred, and any other factors that you deem relevant.

As this passage indicates, the district court took pains to require that the jury evaluate the incident in a context-sensitive manner. Because the jury was properly instructed, it makes no difference that the language of the instruction varied somewhat from what Couch would

have preferred.

3. Overbey's No Contest Plea

The final objection to the jury instructions presents a question of Ohio law. The second count for which Couch stands convicted stems from the allegation that he filed criminal charges against Overbey without probable cause. Couch's defense was that Overbey had in fact engaged in conduct that amounted to assault and resisting arrest. The court permitted the introduction of Overbey's plea of no contest to the attempted assault charge and allowed the government to present evidence of the negotiations that resulted in the plea, including testimony from Overbey that he entered the plea out of fear rather than guilt. Obviously, if the jury were to conclude that by entering a no contest plea Overbey admitted that he had actually engaged in criminal conduct, then Couch would have made out a complete defense to Count Two.

However, the court instructed the jury as follows:

> You have been permitted to consider the fact that Mr. Overbey plead [sic] no contest to the attempted assault and resisting arrest charges against him in the Hamilton County Municipal Court. In instruct you that the plea of no contest is not a plea of guilty, and may not be considered as an admission of guilt by Mr. Overbey of the acts charged. I instruct you, therefore, that you may not draw the inference that Mr. Overbey admitted his guilt, or that he committed the acts charged by virtue of his plea of no contest in the

state court.

This instruction appears to comport with Ohio Revised Code § 2937.07, which directs that a no contest plea "shall not be construed to import an admission of any fact at issue in the criminal charge in any subsequent action or proceeding, whether civil or criminal.[4]

Were this statute the only Ohio authority bearing on the propriety of the instruction, our inquiry would be at an end. However, the Ohio Supreme Court promulgated a rule of procedure purporting to govern no contest pleas, and that rule differs markedly from its statutory counterpart. The Ohio Constitution grants to the Supreme Court the power to prescribe rules governing practice and procedure in all courts of the state, so long as they do not "abridge, enlarge, or modify any substantive right." Ohio Const., art. IV, § 5(b). Statutes that conflict with such rules are of no further

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[4] Section 2937.07 reads in pertinent part as follows:

> If the offense be a misdemeanor and the accused pleads guilty . . . the court . . . shall call for explanation of circumstances of the offense from the affiant or complainant or his representatives, and after hearing the same, together with any statement of the accused, shall proceed to pronounce sentence. . . .
>
> If the plea be "no contest" . . . it shall constitute a stipulation that the judge . . . may make finding of guilty or not guilty from the explanation of circumstances, and if guilt be found, impose . . . sentence accordingly. Such plea shall not be construed to import an admission of any fact at issue in the criminal charge in any subsequent action or proceeding, whether civil or criminal.

force or effect. *Id.; Boyer v. Boyer*, 46 Ohio St. 2d 83, 86, 346 N.E.2d 286, 288, *cert. denied*, 429 U.S. 889 (1976) (rules control on matters of procedure, statutes on matters of substance).

According to the rule promulgated, Ohio Rule of Criminal Procedure 11(B)(2), "[t]he plea of no contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment, information, or complaint, and such plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding." If this rule prevails over the statute, then the jury should have been allowed to consider Overbey's no contest plea as an admission of the truth of the facts alleged in the charging document, since Overbey was not a party to the instant litigation, and the rule prohibits future use of the plea only against a defendant who entered a plea of no contest.

Our resolution of the issue raised by Couch hinges upon whether the broader language of § 2937.07 governing subsequent use of a no contest plea confers a substantive right that survived the promulgation of Ohio Rule of Criminal Procedure 11(B)(2). Although no Ohio court has addressed this precise question, the Ohio Supreme Court has held that another portion of § 2937.07 is substantive and takes precedence over the rule. In *City of Cuyahoga Falls v. Bowers*, 9 Ohio St. 3d 148, 459 N.E.2d 532 (1984), the syllabus to the court's opinion reads as follows: "The provision in R.C. 2937.07 requiring an explanation of circumstances following a plea of no contest has not been superseded by the enactment of Criminal Rule 11 because the statutory provision confers

a substantive right.[5]

Under *Bowers*, a defendant who enters a plea of no contest enjoys a substantive right conferred by the statute to have his guilt or innocence determined upon an explanation of the circumstances of the offense, and to be discharged by a finding of not guilty where the explanation reveals a failure to establish all the elements of the offense. *See Bowers*, 9 Ohio St. 3d at 150, 459 N.E.2d at 535; *Chagrin Falls v. Katelanos*, 54 Ohio App. 3d 157, 159, 561 N.E.2d 992, 994 (1988). It does not follow, however, that the statute also confers a substantive right concerning *all* subsequent uses of a no contest plea.

When the rule and statute are parsed for inconsistencies, what remains is a merger of the procedural parts of the rule with the substantive portions of the statute with the result that:

(1) When one enters a plea of no contest, he admits the facts set out in the explanation of circumstances of the offense entered by the government and consents to the judge determining his guilt or innocence on the basis of that explanation of circumstances;

(2) The judge who receives a no contest plea cannot make a determination of guilt in the absence of an explanation of circumstances that includes facts that satisfy all the elements of the offense, and must discharge

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[5] Under Ohio's unique "syllabus rule," the syllabus to Ohio Supreme Court Opinions contains the law of the case. *State ex rel. Donahey v. Edmondson*, 89 Ohio St. 93, 107-08, 105 N.E. 269, 273 (1913).

the defendant where the explanation is defective in that regard; and

(3) A defendant's no contest plea or admission cannot be used against him in any subsequent civil or criminal proceedings. As this prohibition retains any substantive right conferred by the statute on a defendant entering a no contest plea, the Ohio Supreme Court was at liberty to eliminate by rule the arguably broader nonsubstantive prohibition found in the statute.

As a consequence, Ohio law did not prohibit the jury's consideration of Overbey's willingness to admit the truth of the facts underlying the attempted assault charge when he pleaded no contest to that charge, since he is not a party to this litigation. The district court should have instructed the jury that it was entitled to weight Overbey's willingness to admit the truth of those facts against his testimony that he entered his plea out of fear rather than guilt for purposes of determining his guilt or innocence on the criminal charge. Although the admission of fact he made in the earlier criminal proceeding does not preclude Overbey's explanation of the reason he made that admission, the jury was nevertheless entitled to weight that earlier admission against his most recent explanation. Furthermore, because the significance of the no contest plea goes to the heart of Couch's defense to the second count of the indictment, the erroneous instruction cannot be said to be harmless, and requires reversal of the conviction for willfully filing criminal charges without probable cause.[6] Couch is entitled to a

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[6] Because the admissions made by Overbey in the context of the no contest plea, if deemed conclusive by the jury, would not

(continued...)

new trial on Count Two.

B. Newly Discovered Evidence

Couch's final challenge to the validity of his conviction relates to evidence that came to light after trial respecting the testimony of a principal government witness, Officer Donald Andrews.

According to the affidavit of Lieutenant William Dorsey signed on October 4, 1993, Andrews had requested a meeting the previous summer. He appeared in what Dorsey described as "a very distressed and emotional condition" because of the "consequences of the Overbey matter." Specifically, Andrews told Dorsey that two other individuals, whom he named, were responsible for the Overbey beating.

Based upon this information, Couch moved for a new trial pursuant to Federal Rule of Criminal Procedure 33. The district court responded by ordering an evidentiary hearing. Several witnesses, including Andrews, testified. At the hearing, Andrews stated that "Lieutenant Dorsey started changing things around" with respect to the substance of their conversation. According to Andrews, he did not recant his trial testimony.

In its order denying the motion, the district court summed up the testimony in these terms: "[T]hroughout these proceedings Officer Andrews held steadfastly to his

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[6](...continued)
constitute a complete defense with respect to defendant's use of unreasonable force, reversal is not required as to the first count of the indictment.

original testimony. Furthermore, none of the witnesses testified that Officer Andrews had ever recanted his testimony in regard to Defendant Couch."

This court reviews the denial of a motion for a new trial for abuse of discretion by the district court. *United States v. Barlow*, 693 F.2d 954, 966 (6th Cir. 1982), *cert. denied*, 461 U.S. 945 (1983). Such motions, when based on "recanting" witnesses, are viewed with suspicion. *United States v. Chambers*, 944 F.2d 1253, 1264 (6th Cir. 1991), *cert. denied*, 502 U.S. 1112 (1992).

The criteria for obtaining a new trial based upon newly discovered evidence is well-settled and requires the movant to prove that the evidence: (1) was only discovered after trial; (2) could not have been discovered earlier; (3) is material; and (4) would likely have produced an acquittal. *United States v. Garland*, 991 F.2d 328, 335 (6th Cir. 1991).

After reviewing the record, we conclude that the district court properly declined to grant a new trial. Andrews explicitly testified that he did not recant his testimony. In fact, no witness maintained that Andrews told him that his testimony about Couch was inaccurate, only that others were equally, of not more, culpable. Furthermore, both Andrews' attorney and the assistant United States Attorney denied that any promises were made in exchange for testimony. Under these circumstances, Couch has failed to make the required evidentiary showing and the district court was well within its discretion in denying the motion.

C. Sentencing Issues

1. Offense Classification

The first issue raised by Couch with respect to his sentencing involves the district court's decision to classify the underlying offense as an aggravated assault. To determine the base offense level for a violation of a person's civil rights, the Sentencing Guidelines instruct the district court to apply the greater of 10 or "6 plus the offense level applicable to any underlying offense." U.S.S.G. § 2H1.4(a). The court selected aggravated assault as the underlying offense, which a related Application Note defines as "a felonious assault that involved (a) a dangerous weapon with intent to do bodily harm (*i.e.*, not merely to frighten), or (b) serious bodily injury . . . ." U.S.S.G. § 2A2.2, comment. (N.1).

Essentially, Couch's challenge is factual. He argues that, rather than intend to do bodily harm, he was merely reacting to a situation he perceived as threatening. This contention is at odds with testimony that Couch struck Overbey on the head with a flashlight while he was face-down on the ground. Moreover, Couch does not seriously contend that a metal flashlight is not a "dangerous weapon" and, in fact, the Eleventh Circuit has found that a metal pipe falls under the definition. *United States v. Park*, 988 F.2d 107, 110 (11th Cir.), *cert. denied*, 114 S. Ct. 226 (1993).

Accordingly, the district court properly classified the underlying offense.

2. Use of a Dangerous Weapon

The district court enhanced Couch's sentence by four levels because it found that a dangerous weapon was used. U.S.S.G. § 2A2.2(b)(2)(B). Couch argues that this constitutes "double counting" because it is the use of the flashlight as a dangerous weapon that transforms a minor

assault into an aggravated assault under the Sentencing Guidelines. *Compare* U.S.S.G. § 2A2.2 *with* § 2A2.3 (possession of a dangerous weapon versus use thereof a distinguishing factor).

The contention is without merit. The language of the aggravated assault provision clearly provides for a calibrated adjustment of the offense level according to the use made of the dangerous weapon and, as such, does not double count. U.S.S.G. § 2A2.2(b)(3).

3. Enhancement for Serious Bodily Injury

The aggravated assault provision also permits a four-level upward adjustment in the base offense level when the victim sustains serious bodily injury.[7] U.S.S.G. § 2A2.2(b)(3)(B). Serious bodily injury, in turn, is defined as "involving extreme physical pain or the impairment of a function of a bodily member, organ, or mental faculty." U.S.S.G. § 1B1.1, comment. (N.1(j)).

The district court found that Overbey suffered serious bodily injury and therefore imposed this upward adjustment. Because the resolution of this question is factual, we review for clear error. *United States v. Tipton*, 11 F.3d 602, 609 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 2692 (1994). Overbey testified that he was "pretty busted up" after the incident; he required emergency medical treatment, including stitches, and suffered pain as a result. That the emergency room doctor did not diagnose any long-term cognitive impairment does not

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[7] Defendant concedes that the victim sustained "bodily injury," which results in a two-level enhancement. U.S.S.G. § 2A2.2(b)(3)(A).

invalidate the trial court's ruling given our standard of review.

4. Denial of Downward Departure

Finally, Couch argues that the district court abused its discretion in declining to grant him a downward departure. He cites several reasons to justify the departure: the victim's criminal behavior enhanced the danger perceived; he has lost his profession; as a former police officer, he is at greater risk during incarceration; he poses no threat to the community; and the court did not consider Couch's conduct in light of all the circumstances.

However, this court does not review denial of a motion for downward departure as long as the sentence imposed was within the properly calculated guideline range. *United States v. Moss*, 9 F.3d 543, 554 (6th Cir. 1993). Accordingly, we will not consider this argument.

III.

For the foregoing reasons, the conviction and sentence imposed under the first count of the indictment are **affirmed**. The conviction and sentence imposed under the second count of the indictment are **reversed**, and the cause is **remanded** To the district court for further proceedings according to law and consistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	No. CR-1-93-033-01
	)	
	)	ORDER DENYING
Plaintiff,	)	DEFENDANT'S
	)	MOTION FOR A
v.	)	NEW TRIAL AND
	)	MOTION FOR
ROBERT COUCH, et al.	)	ACQUITTAL
	)	
Defendants.	)	

This matter is before the Court on Defendant Robert Couch's Motion for a New Trial and Renewed Motion for Acquittal on Count Two of the Indictment (doc. 84), the Government's Memorandum in Opposition (doc. 86), Defendant Robert Couch's Reply (doc. 89), Defendant Couch's Proposed Findings of Fact and Conclusion of Law (doc. 98), the Government's Brief in Opposition to Defendant's Motion for a New Trial (doc. 100) and Defendant Couch's Motion for Leave to File Amended Proposed Findings of Fact and Conclusions of Law Beyond the Deadline Set by Court and appended Proposed Findings (doc. 101).

BACKGROUND

The Defendant, Robert Couch, was a police officer in the Covington Police Department. In the early hours of August 12, 1989, Covington Police officers attempted to apprehend a speeder, Larry Overbey, on Interstate 75. Overbey failed to stop and numerous members of the Covington Police, including Defendant Couch, pursued Overbey across the Brent Spence Bridge into Ohio, where Overbey finally pulled over. When Defendant Couch arrived, Overbey was under the control of Patrolman Don E. Andrews. Andrews testified at trial that Defendant Couch and others, including Andrews himself struck Overbey in the head causing serious injury. When Cincinnati Police arrived on the scene, Overbey was lying in a pool of blood. Later Officer Couch went to the Clerk's Office of the Hamilton County, Ohio, Municipal Court and swore out two complaints against Overbey charging him with assault and resisting arrest.

Following a two-week trial, Defendant Robert Couch was found guilty by a jury on two counts. On Count One he was convicted of a felony Violation of Civil Rights Under Color of Law in violation of Title 18 United States Code Section 242. On Count Two he was convicted of a misdemeanor Violation of Civil Rights Under Color of Law in violation of Title 18 United States Code Section 242. Count One involved the use of excessive force in the arrest of Larry Overbey. Count Two involved the filing of false charges against Overbey in Hamilton County Municipal Court.

At the trial the Government's main witness was Officer Don Andrews of the Covington Police. Officer Andrews testified that Overbey was not fleeing or resisting arrest when Defendant Couch arrived on the scene and that Defendant Couch had repeatedly struck Overbey in the head with his flashlight. Officer Andrews

also incriminated himself by testifying that he too had struck Overbey unnecessarily.

Prior to and during the trial, Officer Andrews was under great stress and experienced depression. Encouraged by his wife, he sought psychological counseling from Dr. Walter W. Lippert, whose practice primarily involves counseling police officers. Shortly after the end of the trial, and the conviction of Defendant Couch, Officer Andrews met with his Day Watch Supervisor, Lt. William C. Dorsey. Officer Andrews expressed questions about his ability to continue with police work. He also expressed his disappointment that he and Defendant Couch were bearing the burden of the events surrounding the Overbey incident, while there were others who had participated but who were suffering no consequences. Later, Officer Andrews shared similar concerns and complaints with his friend and fellow Covington Police Officer Charles Vallandingham.

Lt. Dorsey informed Defendant Couch of his conversation with Officer Andrews and in response the Defendant has filed the Motion which is presently before the Court. Defendant Couch alleges that Officer Andrews' conversation with Lt. Dorsey reveals new evidence which should convince the Court to order a new trial.

On November 23, 1993, the Court conducted an evidentiary hearing on Defendant's motions. Testimony was taken from Joseph Rieskamp, Chief of the Covington Police Department, Lt. William C. Dorsey, Day Watch Supervisor for the Covington Police Department, and Officers Charles Vallandingham and Don Andrews of the Covington Police Department. At that hearing, Officer Andrews' Psychologist, Dr. Lippert appeared through his

attorney Robert L. Davis, requesting the Court to quash Dr. Lippert's subpoena on grounds of doctor-patient privilege. With the permission on the record of Officer Andrews, the Court accepted a copy of Andrews' medical records for in camera inspection.

Upon in camera review, the Court concluded that testimony should be heard from Dr. Lippert to explain an abrupt swing in Officer Andrew's mood. Dr. Lippert's records indicate this change occurred some time after the end of the trial and the Doctor attributed the transformation in part to news that the Justice Department had decided not to prosecute Officer Andrews. A second hearing was held on December 9, 1993. At that time testimony was taken from Dr. Lippert, Officer Andrews and Philip Taliaferro, Esq., Officer Andrews' attorney.

These two hearings extended over a period of six hours. At the conclusion of each, the parties were directed to provide proposed findings of fact and conclusions of law to supplement the briefing already submitted on the pending motion. It must be emphasized that throughout these proceedings Officer Andrews held steadfastly to his original testimony. Furthermore, none of the witnesses testified that Officer Andrews had ever recanted his testimony in regard to Defendant Couch.

In rendering our decision of this matter, we have considered the testimony of the witnesses, the documents admitted into evidence, the Government's proposed findings of fact and conclusions of law (doc. 100), and the Defendant's proposed findings of fact and conclusions of law (doc. 101).

In weighing the testimony of the witnesses, we considered each witness' relationship to the Government or to the Defendant; their interest, if any, in the outcome of the trial; their manner of testifying; their opportunity to observe or acquire knowledge concerning facts about which they testified; and the extent to which they were supported or contradicted by other credible evidence.

After a thorough review of the testimony, the Court is satisfied that Officer Andrews' testimony was neither false nor impeached. For this reason, we conclude that the jury's verdict should not be disturbed and that Defendant Robert Couch's Motion for a New Trial and Renewed Motion for Acquittal on Count two of the Indictment must be denied.

STANDARD OF REVIEW

The Defendant has moved for a new trial under Federal Rule of Criminal Procedure 33 and renewed his motion for acquittal under Rule 29. A defendant seeking to have a court affirm a motion for acquittal in derogation of a jury verdict, bears a very heavy burden. *United States v. Knipp*, 963 F.2d 839, 846 (6th Cir. 1992). A denial of a motion for acquittal is appropriate when "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). A trial judge confronted with a motion for acquittal must consider all the evidence in a light most favorable to the government. *United States v. Adamo*, 742 F.2d 927, 932 (6th Cir. 1984).

> There is no place . . . for arguments regarding a government witness' lack of credibility in a Rule 29 motion for acquittal

> before a federal trial judge. A trial judge considering a Rule 29 motion may neither weigh conflicting evidence nor consider the credibility of witnesses.

Id. at 934-35.

In deciding a motion for a new trial the trial judge has more latitude, but the Defendant's burden is still substantial. Although the decision to grant or deny a motion for a new trial rests in the sound discretion of the trial court, such a motion is disfavored and should be granted with caution. *United States v. O'Dell*, 805 F.2d 637, 640 (6th Cir. 1986), *cert. denied*, 484 U.S. 859 (1987). The Sixth Circuit Court of Appeals has established a four part test for determining whether a new trial should be granted under Rule 33 on the basis of new evidence.

> The defendant must establish the following: (1) the new evidence was discovered after the trial; (2) the evidence could not have been discovered earlier with due diligence; (3) the evidence is material and not merely cumulative or impeaching; and (4) the evidence would likely produce acquittal.

United States v. Seago, 930 F.2d 482, 488 (6th Cir. 1991).

Furthermore, for perjured testimony to form the basis for a new trial, the court must be "reasonably well satisfied that the testimony given by a material witness [was] false; [and] that, without it, the jury might have reached a different conclusion . . . ." *Gordon v. United States*, 178 F.2d 896, 900 (6th Cir. 1949) *cert. denied*, 339 U.S. 935 (1950); *United States v. Chambers*, 944 F.2d 1253, 1264 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 1217 (1992)

(citing *Gordon*). Finally, in ruling on a motion for a new trial, the court has the "power to weigh the evidence and access the credibility of both the witnesses who testified at trial and those whose testimony constitutes 'new' evidence." *United States v. Wright*, 625 F.2d 1017, 1019 (1st Cir. 1980).

DISCUSSION

The Defendant has requested the Court to consider his Amended Proposed Findings of Fact and Conclusions of Law though they were filed beyond the deadline set by the Court. The government does not oppose the motion. The Court has conducted extensive hearings into the issues raised by the Defendant's Motion for a New Trial. In the interest of justice, the Court deems it prudent to continue to give attention to every argument the Defendant offers. Accordingly, the Defendant's Motion for the Court to consider his Amended Proposed findings of Fact and Conclusions of Law (doc. 101), filed beyond the scheduled deadline, is hereby granted.

The Defendant urges the Court to order a new trial or acquittal on two grounds. First, the Defendant argues that the jury's findings must be disturbed in light of material new evidence discovered since the trial. Second, the Defendant maintains that the Court erred in its instruction to the jury concerning the use of force by police officers and in its instruction concerning the use of force by police officers and in its instruction concerning the effect of Larry Overbey's plea of no contest in state proceedings. We will consider the Defendant's arguments in that order.

A. Newly Discovered Evidence

The Defendant contends that Officer Don Andrews, the Government's principal witness, testified falsely at trial in at least two critical areas. First, the Defense claims that the testimony Andrews gave at trial concerning the Overbey incident was false. The second argument is an attack on Don Andrews' credibility, based on his testimony with regard to the Overbey incident as well as the Cooperation Agreement into which he entered with the government.

Lt. William C. Dorsey

In support of his claim of newly discovered evidence, Officer Couch relies primarily on the testimony of Lt. William C. Dorsey of the Covington Police Department. Lt. Dorsey testified that soon after the end of the trial, he met with Don Andrews in a parking lot at Officer Andrews' request. Lt. Dorsey alleges that at this meeting Officer Andrews stated that Covington Police Officer Rob Ervin and Rev. Bill Stith, the Covington Police Department Chaplain, were the primary instigators of the beating of Larry Overbey. Lt. Dorsey further alleges that Officer Andrews told him that Andrews had been promised by the government that in exchange for his cooperation, he would be charged with a misdemeanor and receive probation. Officer Couch claims that Officer Andrews' alleged statement to Lt. Dorsey undermines Officer Andrews' trial testimony and entirely undercuts the Government's theory of the case against him. Since Officer Andrews' testimony was crucial to Defendant Couch's conviction, the Defendant believes that this newly discovered testimony warrants a new trial.

Upon cross examination Lt. Dorsey indicated that the alleged conversation in the parking lot lasted only

about 15 minutes, and that only three to five minutes were spent on the new evidence. Lt. Dorsey further testified that he did not question Officer Andrews about the allegations nor did he take notes. Nowhere in his testimony did Lt. Dorsey indicate that Don Andrews ever changed his testimony concerning Defendant Couch. Finally, Lt. Dorsey testified that no further investigations were ever undertaken by the Covington Police Department or anyone else in response to the accusations against new parties allegedly made to him in the parking lot by Don Andrews.

Officer Charles Vallandingham

Defendant Couch claims that Lt. Dorsey's testimony is corroborated by that of Officer Vallandingham, Don Andrews' friend, confidant and fellow Covington Police Officer. Vallandingham testified that Andrews expressed to him concern that individuals responsible for the Overbey beating were escaping accountability, and that he thought the Rev. Stith and Officer Ervin had inflicted blows on Overbey. Officer Vallandingham was not certain whether Andrews had been recounting what he had concluded or what he actually saw. He was sure, however, that Andrews never recanted his testimony concerning Defendant Couch's activities, nor did Andrews ever deny his own culpability. Vallandingham also testified that Andrews was concerned about his criminal liability, and that Andrews never indicated that the government had promised him a deal.

Officer Don Andrews

Taking the witness stand during both hearings, Don Andrews testified that he had not changed his trial testimony. In response to the Court's inquiry he testified

that he was "firm in [his] belief that who [he] observed at the time this incident occurred was [Defendant] Couch." Hearing Transcript at 108 (November 23, 1993). He admitted that from listening to trial testimony and news accounts he had come to a conclusion "in his gut" that Officer Ervin and Rev. Stith had also delivered blows to Overbey. However, this is in no way inconsistent with his trial testimony. At trial Officer Andrews testified that there were several individuals who delivered blows to Overbey besides Defendant couch and himself. Under oath, he was unwilling or unable to speculate as to their identity. It is not unreasonable that after the revelations of other witnesses at the trial, Officer Andrews may have concluded "in his gut" that Officer Ervin and Rev. Stith were the other individuals involved in the beating. The fact that at trial he relied upon what he saw and not what he felt "in his gut," strengthens rather than weakens the testimony he gave against Defendant Couch.

Furthermore, Officer Andrews categorically denied that the government had offered any promises beyond the Cooperation Agreement. After the trial, his attorney, Philip Taliaferro, spoke with government prosecutor Perez. Andrews admitted that he experienced a sense of relief when Mr. Taliaferro expressed to him the opinion that it would be unfair for the government to prosecute one who had held up his end of the bargain and who had sacrificed his job as a result of his testimony. Having viewed Don Andrews twice more on the witness stand, the Court reaches the same conclusion concerning his reliability as a witness that the jury arrived at after listening to Andrews testify for a full day.

Dr. Walter W. Lippert

Defendant Couch's final challenge to Don

Andrews' credibility is based on Lt. Dorsey's testimony that Andrews admitted having received a deal from the government in exchange for testimony. The Defense argued that evidence of this deal was found in the report of Don Andrews' psychologist, Dr. Lippert. Dr. Lippert had previously reported to the Covington Police that he felt that Officer Andrews was too anxious and depressed for active duty. Then, in a letter to Colonel Steve Schmidt of the Covington Police, dated July 20, Dr. Lippert indicated that he felt Andrews was ready to return to active duty. He described a marked improvement in Andrews' psychological well-being which he attributed in part to an "apparent" clearance from the Justice Department. Out of an abundance of caution, and with the express permission of Officer Andrews, the Court denied Dr. Lippert's request for doctor-patient privilege, and ordered him to testify. At the hearing Dr. Lippert affirmed that before and throughout the trial, Don Andrews had asserted to him that although his colleagues suspected he had made a deal with the Justice Department, in truth he had not. Dr. Lippert also testified that the specter of prosecution weighed heavily on Andrews until well after the trial, and was a factor leading to Andrews' brief hospitalization on July 14, 1993. Dr. Lippert further testified that it was Andrews' conversation with his own attorney, Mr. Taliaferro, which made Andrews less anxious about being personally prosecuted.

Philip Taliaferro, Esq.

Philip Taliaferro, Mr. Andrews' own attorney, testified to his conversation with Mr. Perez at the Justice Department and subsequent conversations with his client. He testified that although Mr. Perez had indicated that the government was satisfied that Mr. Andrews had

upheld his end of the Cooperation Agreement, no promises were made, even when specifically solicited. He further testified that he was very concerned about the emotional state of his client and that he had tried to convey a sense of optimism to Mr. Andrews concerning the likelihood of future prosecution by the Justice Department. After hearing the testimony of Dr. Lippert as well as that of Philip Taliaferro, we are again satisfied that they do not damage Mr. Andrews' credibility. In fact, Dr. Lippert's records indicate that Andrews was depressed concerning impending criminal liability well after the trial and after the alleged recanting to Lt. Dorsey. Therefore, Dr. Lippert's testimony substantiates that of Andrews in this regard and creates the inference that even if an offer of leniency was made, it came after Andrews conversation with Lt. Dorsey and it could not have influenced Andrews' trial testimony.

Analysis

We turn now to the Sixth Circuit test, in order to decide whether the Defendant's newly discovered evidence warrants a new trial. First the evidence must be material as opposed to merely impeaching. *United States v. Seago*, 930 F.2d at 488. At best the new evidence offered by the Defendant is impeaching. The new evidence does raise serious questions about the culpability of parties not before this court. However, when carefully examined, the new evidence tends to affirm and corroborate Don Andrews' trial testimony, especially in regard to Defendant Couch.

Second, under the *Seago* test, in order to warrant a new trial, we must decide that it is likely that the newly discovered evidence would have produced an acquittal if considered by the jury. *Id.* We do not find the

Defendant's new evidence so persuasive as to have swayed the jury from their finding. Defendant Couch argues that the new evidence destroys the credibility of the government's key witness. We are not, however, persuaded that the testimony given by Officer Andrews was false. See *Gordon v. United States*, 178 F.2d at 900.

B. Jury Instructions

The Defendant makes two objections to the Court's jury instructions. First, the Defendant contends that the jury instruction regarding the use of force by a police officer was inadequate. Second, the Defense takes exception to the Court's jury instruction regarding Larry Overbey's "no contest" plea. We will consider each objection in turn.

Use of Force

In reviewing the adequacy of a jury charge, the standard of review is whether the charge taken as a whole, fairly and adequately submits the issues and applicable law to the jury. *United States v. Lee*, 991 F.2d 343, 350 (6th Cir. 1993). The charge must be considered as a whole, and "no single provision can be read in isolation." *Id.* The Defendant objects that specific instructions which he offered to the Court for inclusion in the charge were rejected. Further, he argues that in the absence of these instructions the charge was so deficient that the jury was not properly guided as to the special viewpoint of a police officer acting under the pressure of making an immediate decision in a dangerous situation.

At the Defendant's request during the charging

conference the Court fashioned a modified jury instruction regarding the use of force specifically incorporating a number of Defendant Couch's proposals. In reviewing the final charge which emerged from the charging conference the Court is satisfied that it adequately guided the jury in light of the law. See *Graham v. Connor*, 490 U.S. 386, 396 (1989).

Furthermore, although the Court held that the Defendant's proposed charge was not required, the Court did allow counsel for the Defendant to read the excluded sections of his proposed jury instructions to the jury during closing arguments. In reviewing the sufficiency of jury instructions, a court must consider the claimed deficiencies in a jury charge by looking to the entire charge in the context of trial "including counsel's closing arguments." *United States v. Welch*, 810 F.2d 485, 488 (5th Cir. 1987).

No Contest Plea

Defendant couch makes two arguments concerning Larry Overbey's no contest plea in the proceedings in Hamilton County Municipal court where he was charged with assault and resisting arrest. The Defense contends first that the court's jury instructions on this matter were defective and second that Overbey's plea requires this court to grant Defendant's Motion for Acquittal on Count Two, the count dealing with arrest without probable cause.

At the insistence of the Defendant, the Court reconsidered its previous holding and agreed to allow the introduction of Overbey's no contest plea in state court on the charge of attempted assault. At the time we remarked that "[t]he Court views this as not only a

serious, but also as a very close, question. We have therefore reconsidered this issue and conclude, out of an abundance of caution, that the evidence should be admitted with a thorough and limiting instruction to the jury on the nature of the nolo plea. Order, Document 56, July 1, 1993. We remain convinced that the admission of the plea was appropriate and maintain that the jury was properly instructed on the consideration they could properly give to such a plea under Ohio and federal law.

Finally, Defendant Couch contends that this Court must grant his Rule 29 Motion for Acquittal on Count Two as a matter of law because of the preclusive effect of Larry Overbey's no contest plea in state court. We note that we have previously rejected the Defendant's argument. See Order Denying Defendants' Motions to Dismiss Indictment, Document 29, May 24, 1993. In that Order we held that in federal actions, a state court judgment did not deserve preclusive effect, when the party against whom the state court decision is asserted did not have full and fair opportunity to litigate the claim or issue decided by the state court. See *Haring v. Promise*, 462 U.S. 306, 313 (1983). The Plaintiff in this case is the United States of America, which had no representation in the state court action. For this and other reasons more fully argued in our previous order, we deny the Defendant's Motion for Acquittal on count Two.

CONCLUSION

When a Defendant has had his day in court, and has had a fair trial, the Court must be reluctant to disturb the finding of a jury of his peers. We find instructive a quotation found in a recent Sixth Circuit Case, although cited there for a slightly different reason.

> A procedural system which permits an endless repetition of inquiry into facts and law in a vain search for ultimate certitude implies a lack of confidence about the possibilities of justice that cannot but war with the underlying substantive commands . . . . There comes a point where a procedural system which leaves matters perpetually open no longer reflects humane concern but merely anxiety and a desire for immobility.

Ritchie v. Eberhart, No. 92-5643 slip op. at 3 (6th Cir. Dec. 8, 1993) citing *McKlesky v. Zant*, 111 S. Ct. 1454, 1469 (1991) citing Paul Bator, *Finality in Criminal Law*, 76 Harv. L. Rev. 441, 452-53, (1963). However, the Defendant's Motion and the affidavits upon which it relies, raised concerns which the Court felt compelled to investigate. Having studied the Defendant's briefs and having now held two hearings on these issues, we are satisfied that the jury's findings must not be disturbed.

Accordingly, Defendant Robert Couch's Motion for a New Trial and Renewed Motion for Acquittal on Count Two of the Indictment is hereby denied.

SO ORDERED.

Dated: Jan. 4, 1994

/s/
S. Arthur Spiegel
United States District Judge

APPENDIX C

FILED
FEB. 28, 1994
U.S. District
Court, Cincinnati,
Ohio

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	CR-1-93-033-01
Plaintiff,	)	
	)	H. Louis Sirkin, Esq.
v.	)	Defendant's Attorney
ROBERT COUCH,	)	
Defendant.	)	

JUDGMENT IN A CRIMINAL CASE
(Offense on or after November 1, 1987)

The defendant was found GUILTY on Counts One and Two after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such counts, which involves the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number
18 USC 242	Violation of Civil Rights Under Color Of Law	Aug. 12, 1989	One
18 USC 242	Violation of Civil Rights Under Color Of Law	Aug. 12, 1989	Two

The defendant is sentenced as provided in this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay a special assessment of $75.00, for Counts One and Two, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid.

/s/
S. Arthur Spiegel
United States District Judge

February 28, 1994
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of SIXTH THREE (63) MONTHS on Count One and TWELVE (12) MONTHS on Count Two, each term to run concurrently.

The Court finds that the defendant does not have the ability to pay a fine in this case. However, the defendant is ordered to pay $714.00 in restitution, due immediately, to the victim, Larry Dean Overbey, said payments are to be made to: Clerk, U.S. District Court for transfer to the payee.

Within 72 hours of release from custody of the U.S. Bureau of Prisons, the defendant shall report in person to the Probation Office in the district to which he is released.

The defendant shall surrender for service of sentence at the institute designated by the Bureau of Prisons before 12:00 noon on Monday, March 28, 1994. The present O.R. Bond is continued during the stay of execution.

Upon release from imprisonment, the defendant shall be on supervised release for a term of TWO (2) YEARS on count One and One Year on Count Two, each term to run concurrent.

While on supervised release, the defendant shall not commit another Federal, state or local crime, he shall be prohibited from possessing a firearm or other dangerous weapon and shall not illegally possess a controlled substance. The defendant shall comply with

the standard conditions of supervision of the Southern District of Ohio (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release in such amounts and at such times as directed by his Probation Officer.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without permission of the court or probation officer;

2) the defendant shall report to he [sic] probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquires [sic] by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer

within seventy-two hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed or admininistered;

9) the defendant shall not associate with any persons engaged in a criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him/her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's

compliance with such notification requirement.

STATEMENT OF REASONS

The Court adopts the factual findings and guideline application in the presentence report, excepting that the Court reduces the enhancement from four levels to three levels for the serious bodily injury suffered by the victim. The Court finds that based on a preponderance of the evidence that the defendant's objection to a four level enhancement for aggravated assault is denied. The Court also finds based on a preponderance of the evidence that the two level enhancement since the defendant obstructed justice is not warranted.

GUIDELINE RANGE DETERMINED BY THE COURT:

Total Offense Level: 26
Criminal History Category: I
Imprisonment Range: 63 to 78 Months
Supervised Release Range: 2 to 3 Years
Fine Range: $15,000.00 to $150,000.00

The Court finds that the defendant does not have the financial wherewithal to pay a fine and restitution, and while restitution will be ordered, the fine is waived pursuant to 5E1.2.
Restitution: $714.00

The sentence is within the guideline range, that range does not exceed 24 months, and the Court finds no reason to depart from the sentence called for by application of the guidelines.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____

_____ at _____, with a certified copy of this Judgment.

_____

United States Marshal

By_____

Deputy Marshal

I certify that this is a true and correct copy of the original filed in my Office on February 28, 1994.

Kenneth J. Murphy, Clerk
By Paul Schatz,
Deputy Clerk
Date: February 28, 1994

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
JUL 25 1995
LEONARD GREEN,
Clerk

ORDER

UNITED STATES OF AMERICA,	)
Plaintiff-Appellee,	)
v.	)
ROBERT COUCH,	)
Defendant-Appellant.	)

BEFORE: NORRIS and DAUGHTREY, Circuit Judges; FEIKENS, District Judge.*

Upon consideration of the petition for rehearing

* The Honorable John Feikens, Senior U.S. District Judge for the Eastern District of Michigan, sitting by designation.

filed by the defendant,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green, Clerk

APPENDIX E

CRIMES AND CRIMINAL PROCEDURE
18 U.S.C. § 242

§ 242. Deprivation of rights under color of law

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.

(As amended Nov. 18, 1988, Pub.L. 100-690, Title VII, § 7019, 102 Stat. 4396; Sept. 13, 1994, Pub.L. 103-322, Title VI, § 60006(b), Title XXXII, §§ 320103(b) 320201(b),

Title XXXIII, § 330016(1)(H), 108 Stat. 1970, 2109, 2113, 2147.)

APPENDIX F

1988 Revised Edition

FEDERAL SENTENCING GUIDELINES MANUAL

UNITED STATES SENTENCING COMMISSION

Including
Amendments to Guidelines and Official Commentary
(January 15 and June 15, 1988)
Supplementary Illustrations
Amendments to Sentencing Statutes
Model Sentencing Forms

WEST PUBLISHING COMPANY

§ 5K2.0 Grounds for Departure (Policy Statement)

Under 18 U.S.C. § 3553(b) the sentencing court may impose a sentence outside the range established by the applicable guideline, if the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." Circumstances that may warrant departure from the guidelines pursuant to this provision cannot, by their very nature, be comprehensively listed and analyzed in advance. The controlling decision as to whether and to what extent departure is warranted can only be made by the court at the time of sentencing. Nonetheless, the present section seeks to aid the court by identifying some of the factors that the Commission has not been able to fully take into account in formulating precise guidelines. Any case may involve factors in addition to those identified that have not been given adequate consideration by the Commission. Presence of any such factor may warrant departure from the guidelines, under some circumstances, in the discretion of the sentencing judge. Similarly, the court may depart from the guidelines, even though the reason for departure is listed elsewhere in the guidelines (e.g., as an adjustment or specific offense characteristic), if the court determines that, in light of unusual circumstances, the guideline level attached to that factor is inadequate.

Where the applicable guidelines, specific offense characteristics, and adjustments do take into consideration a factor listed in this part, departure from the guideline is warranted only if the factor is present to a degree substantially in excess of that which ordinarily is involved in the offense of conviction. Thus, disruption of

a governmental function, § 5K2.7, would have to be quite serious to warrant departure from the guidelines when the offense of conviction is bribery or obstruction of justice. When the offense of conviction is theft, however, and when the theft caused disruption of a governmental function, departure from the applicable guideline more readily would be appropriate. Similarly, physical injury would not warrant departure from the guidelines when the offense of conviction is robbery because the robbery guideline includes a specific sentence adjustment based on the extent of any injury. However, because the robbery guideline does not deal with injury to more than one victim, departure would be warranted if several persons were injured.

Also, a factor may be listed as a specific offense characteristic under one guideline but not under all guidelines. Simply because it was not listed does not mean that there may not be circumstances when that factor would be relevant to sentencing. For example, the use of a weapon has been listed as a specific offense characteristic under many guidelines, but not under immigration violations. Therefore, if a weapon is a relevant factor to sentencing for an immigration violation, the court may depart for this reason.

Harms identified as a possible basis for departure from the guidelines should be taken into account only when they are relevant to the offense of conviction, within the limitations set forth in § 1B1.3.

APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA	)	No. CR-1-93-033 (1 & 2)
v.	)	
ROBERT COUCH & MICHAEL KRAFT	)	

JURY INSTRUCTIONS

July 8, 1993

THE USE OF FORCE

Regarding Count One, factors which you may consider in your determination of whether the defendants had the requisite specific intent and whether they deprived Larry Overbey of his Constitutional right to be free from the intentional use of unreasonable force by persons acting under color of law include the nature and degree of force allegedly used by the defendants.

A law enforcement officer is justified in the use of any force which he reasonably believes to be necessary to effect an arrest or to hold someone in custody and to use the force which he reasonably believes to be necessary to defend himself or another from bodily harm. If you find that the defendants used force in a given incident, you may then consider whether the force used by the defendants was necessary in the first place or was greater than the force that would appear reasonably necessary from the point of view of a reasonable officer on the scene of the charged event.

In making this determination, you may look to such factors as the severity of the crime of which Larry Overbey was suspected at the time of his arrest; whether, at the time of his arrest, Mr. Overbey posed an immediate threat to the safety of the defendants or other police officers; whether, at the time of his arrest, Mr. Overbey was resisting arrest or attempting to evade arrest by flight; the need for the application of force; whether the victim was restrained; the victim's position in relation to where the defendants were located; the relationship between the need and the amount of force that was used; the extent of injury inflicted; the physical condition of the victim; and whether force was applied in good faith or for the very purpose of causing harm. You may also consider the

character and duration of the alleged assault, and the manner in which the alleged assault occurred, and any other factors that you deem relevant.

If you determine that the force used was unreasonable and excessive, then you may consider that as evidence that the defendants acted with the requisite specific intent, that is, that they specifically intended to do that which the law forbids, and as evidence that they deprived a victim of his Constitutional right to be free from the intentional use of unnecessary force by persons acting under color of law.

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	No. 94-3292
	)	
	)	ON APPEAL
Plaintiff-Appellee,	)	FROM THE
	)	UNITED STATES
v.	)	DISTRICT COURT
	)	FOR THE
ROBERT COUCH,	)	SOUTHERN
	)	DISTRICT OF OHIO
Defendant-Appellant.	)	

MOTION TO PUBLISH OPINION

The United States, appellee, respectfully requests pursuant to Local Rule 24 that the opinion issued in the above-captioned case on June 20, 1995, be published. In support of this motion, the United States submits the following:

1. On March 3, 1993, a federal grand jury indicted defendant, then a police officer for the City of Covington in Kenton County, Kentucky. Count One charged defendant with using unreasonable force resulting in bodily injury during the arrest of Larry Overbey in violation of 18 U.S.C. 242. Count Two charged

defendant with falsely arresting Overbey on charges of assault and resisting arrest in violation of 18 U.S.C. 242. Following a jury trial, defendant was found guilty of both counts.

2. Defendant appealed and argued, inter alia, that the district court erroneously instructed the jury regarding "willfulness," "reasonable force," and Overbey's plea of no contest. On June 20, 1995, this Court issued an 18-page signed opinion in which it affirmed defendant's conviction as to Count One and reversed as to Count Two. It held that the district court's specific intent and reasonable force instructions were proper. It also ruled that the district court's erroneous instruction as to Overbey's no contest plea was harmless as to Count One, but required reversal as to Count Two. On July 25, 1995, this Court denied defendant's petition for rehearing, after calling for and receiving a response from the United States.

3. Local Rule 24 sets forth the criteria for determining whether an opinion should be published. It provides "a presumption in favor of publication of [a] signed * * * opinion[]" (Local Rule 24 \(b)), and states that consideration should be given to inter alia:

> I) whether [the opinion] establishes a new rule of law, or alters or modifies an existing rule of law, or applies an established rule to a novel fact situation;
>
> *****
>
> iii) whether it discusses a legal or factual issue of continuing public interest; [and]
>
> *****

v) whether it reverses the decision below[.]

Applying these criteria, the opinion in this case should be published.

This Court's opinion (slip op. 6-9) properly interprets Supreme Court decisions in both *Screws v. United States*, 325 U.S. 91 (1945), and *Graham v. Connor*, 490 U.S. 386 (1988). In approving the district court's "willfulness" and "reasonable force" instructions, this Court (slip op. 4-9) clarified those decisions and clearly articulated the standard for determining whether a police officer knowingly uses unreasonable force in violation of 18 U.S.C. 242. It also correctly specified that a jury need not be instructed about the "'difficulties of modern police work'" (slip op. 8) when determining whether an officer's use of force was reasonable.

Moreover, this case addresses legal issues of substantial public importance. Prosecutions for the unreasonable use of force in violation of 18 U.S.C. 242 unfortunately are not uncommon. Publication of this decision will provide useful guidance to district courts – and law enforcement officials – concerning the circumstances in which an officer's use of force will violate 18 U.S.C. 242.

Publication is also warranted because this Court partially reversed the judgment below: *i.e.*, it held that the district court's instruction regarding Overbey's no contest plea was error and reversed defendant's conviction as to Count Two.

In sum, this Court's signed 18-page opinion clarifies important issues of continuing public interest. It partially reversed the judgment below. Moreover, the

Court denied defendant's petition for rehearing only after calling for and receiving a response from the United States. In these circumstances, publication of the opinion is warranted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 22, 1995, a copy of the Motion to Publish Opinion was served by first-class mail, postage prepaid, on the following counsel of record:

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APPENDIX I

No. 94-3292

RECEIVED
June 30, 1995
LEONARD GREEN,
Clerk

IN THE UNITED STATES COURT OF APPEAL
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	District Court No. CR-1-93-033
Plaintiff-Appellee,	)	ON APPEAL FROM THE
v.	)	UNITED STATES DISTRICT COURT
ROBERT COUCH,	)	FOR THE SOUTHERN
Defendant-Appellant.	)	DISTRICT OF OHIO (Hon. S. Arthur Spiegel)

PETITION FOR REHEARING (RULE 40 FEDERAL RULES OF APPELLATE PROCEDURE)

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I. POINTS OF LAW AND FACT RAISED BY PETITIONER FOR REHEARING

In this Court's opinion, affirming Robert Couch's conviction under count one of the indictment, the Court overlooked or misapprehended the harmless error rule. First, the Court applied the incorrect standard for harmless error. Second, when the correct harmless-error standard is applied to this case, it is impossible to declare that the error was harmless beyond a reasonable doubt. In short, once this Court found reversible error in the jury instruction for count two, it is impossible for the government to prove that the error was harmless beyond a reasonable doubt as it relates to count one.

II. ARGUMENT

Officer Robert Couch was charged with violating the civil rights of Larry Overbey. In count one, he was charged with using excessive force during the course of

Overbey's arrest. In count two, he was charged with filing false criminal charges against Overbey. The foundation of Mr. Couch's defense to both charges was that Overbey had engaged in conduct that amounted to assault and resisting arrest. The trial court permitted the introduction of Overbey's no contest plea to an amended charge of attempted assault. However, with regard to both counts of the indictment, the trial court specifically instructed the jury that they were not free to draw the inference that Overbey admitted his guilt or that he committed the acts with which he was charged. *United States v. Couch*, No. 94-3292 (6th Cir. June 20, 1995) Joint Appendix (Transcript Excerpts) at 091, hereinafter Appendix.

On appeal, this Court determined in connection to Overbey's no contest plea that "Ohio law did not prohibit the jury's consideration of Overbey's willingness to admit the truth of the facts underlying the attempted assault charge when he pleaded no contest to that charge." *United States v. Couch*, No. 94-3292 (6th Cir. June 20, 1995), at 13, attached as Addendum 1. This Court when on to explain that the jury was entitled to weigh Overbey's earlier admissions against the explanation he offered at trial. *Id.* Furthermore, this Court reasoned that "because the significance of the no contest plea goes to the heart of Couch's defense to the second count of the indictment, the erroneous instruction cannot be said to be harmless." *Id.* As a consequence, this Court reversed Officer Couch's conviction on the second count of the indictment.

This Court held, however, that reversal was not required as to the first count of the indictment because "the admissions made by Overbey in the context of the no contest plea, if deemed conclusive by the jury, would

not constitute a complete defense with respect to defendant's use of unreasonable force." *Couch*, No. 94-3292 at 13, fn. 6. When the Court found error in the trial court's instruction as it related to both counts one and two, the Court impliedly determined that with respect to count one, that the error was harmless. The issue for the purposes of this motion, then, is whether the government proved that the error was harmless beyond a reasonable doubt with regard to count one.

A. Harmless Error: The Legal Standard and The Burden of Proof

When a court of appeals finds error, it must reverse unless the court is able to declare a belief that the error "was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967). In contrast to *Chapman* rule, this Court held that it did not have to reverse on count one unless the admissions by Overbey would have been a "complete defense" to Couch's use of unreasonable force. Counsel for Petitioner has conducted an exhaustive search of the case law, both within and without this judicial circuit, and has been unable to discover any precedent which heightens the harmless error analysis to the level of "a complete defense."

The most recent United States Supreme Court cases recognize a category of constitutional violation which the Court characterizes as "trial errors." See, generally, *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1717 (1992). According to the Supreme Court, a trial error occurs during the presentation of the case to the jury, and is amenable to harmless error analysis because it may be "qualitatively assessed in the context of other evidence presented in order to determine [the effect it had on the

trial]." *Brecht*, 113 S. Ct. at 1717, citing to *Arizona v. Fulminante*, 499 U.S. 279 (1991). Before a federal constitutional error involving "trial error" can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt. *Chapman*, 386 U.S. at 24, as explained in *Brecht*, 113 S. Ct. at 1717 and 1720 (explaining different standard for habeas review and direct appeal). Moreover, the burden of proof is on the government to show that the error was harmless within the meaning of *Chapman*. *Brecht*, 113 S. Ct. at 1717; see also *O'Neal v. McAninch*, 115 S. Ct. 992, 995 (1995) (harmless error standard discussed in context of federal habeas review and contrasted to standard of harmless error applicable in the context of direct review of a constitutional trial error).

The issue that this Court did not squarely address, and hence misapprehended, is whether the trial court's erroneous instruction as to Overbey's admissions in his no contest plea was harmless beyond a reasonable doubt. *Chapman*, 386 U.S. at 24. For the following reasons, when "qualitatively assessed in the context of the other evidence presented at the trial," it is apparent that the trial court's erroneous instruction, which required a reversal on count two of the indictment, cannot be declared harmless beyond a reasonable doubt in its impact on the conviction of Officer Couch on count one of the indictment.

B. Harmless Error Applied to the Facts of this Case

1. Overbey's Assault and Resistance to Arrest

First, the trial court's instruction destroyed Mr. Couch's defense that he was reacting to Overbey's assault and resistance to arrest. The Court clearly recognized the

foundation of Couch's defense to both counts in this case was that Officer Couch was reacting to conduct by Overbey that constituted an assault and resisting arrest. *Couch*, No. 94-3292 at 9 and 13 fn. 6. Officer Couch testified at trial that as he approached the scene, he found Andrews, with his gun out, grappling with Overbey. Officer Couch further testified that he reached out to grab Overbey, Couch was hit in the chest and knocked backward onto the ground. Appendix at 344-345. Officer Couch further testified he then jumped up from the ground and struck Overbey in the body with his flashlight. *Id.* For his part, Overbey stated at trial that he offered no physical resistance to any of the police officers and that when he was approached by the officers he had already placed both his hands behind his head. Appendix at 404.

In its opinion, in considering the prejudice of the trial court's instruction to the jury regarding the no contest plea as it relates to count one, this Court focused almost exclusively on the bearing that Overbey's admissions had on the jury's assessment of his credibility, not on the underlying acts of assault and resisting arrest:

> The district court should have instructed the jury that it was entitled to weigh Overbey's willingness to admit the truth of the facts against his testimony that he entered his plea out of fear rather than guilt for purposes of determining his guilt or innocence on the criminal charge. Although the admission of fact he made in the earlier criminal proceeding does not preclude Overbey's explanation of the reasons he made the admission, the jury was nevertheless entitled to weigh that

> earlier admission against his most recent explanation.

Couch, No. 94-3292 at 13.

Although this Court stated, quite appropriately, that the testimony regarding the no contest plea was material to the jury's assessment of Overbey's credibility, the factual admissions of Overbey, which the trial court's instruction kept from the jury, vouched mightily for Couch's defense that he was reacting to Overbey's assault and resistance to arrest. Indeed, the truth of Officer Couch's assertions that his actions were but a reaction to the provocations of Overbey were central to the theory of the defense. In a similar circumstance, a panel of this circuit has found that an erroneous evidentiary ruling which strikes at the hear of the defendant's theory of the case cannot be relegated to the status of harmless error. See, generally, *Houston v. Dutton*, No. 94-6064 (6th Cir. March 28, 1995) WL 128700 at * 5, attached as Addendum 2, (finding the error not to be harmless even under the lessor standard for harmless error in habeas corpus proceedings). In *Houston*, a habeas petitioner had been convicted in a Tennessee state court of robbery by use of a deadly weapon and a first degree murder. At trial the petitioner had argued that the killing in question was the result of an accident. Nevertheless, the trial court had instructed the jury, in effect, that if the state proved a killing beyond a reasonable doubt the killing must be presumed to be malicious. The Sixth Circuit ruled that the jury instruction was constitutionally infirm and under the circumstances of the case could not be considered as mere harmless error for the following reason:

> The instruction to presume malice from the unrefuted facts of an unlawful killing

> and the use of a deadly weapon essentially told the jury to reject petitioner's claim that the shooting was accidental. By thus destroying the defendant's theory of accident at the outset, the malice instruction substantially and injuriously affected the verdict, resulting in prejudice to the defendant.

Id.

The reasoning of the *Dutton* court applies with equal force and effect to the trial court's erroneous instruction concerning Overbey's admissions as part of his no contest plea. When the trial court instructed the jury to disregard Overbey's admissions that he attempted to assault Officer Couch, the trial court effectively destroyed the defendant's theory of the case. Indeed, the trial court's instruction virtually sealed Officer Couch's fate on count one. The instruction prohibited the jury from considering evidence, from Overbey's own mouth, that corroborated in toto Officer Couch's defense that he was merely reacting to Overbey's hostile actions toward him.[1] Even under the lessor habeas harmless-error standard, it cannot seriously be disputed that the trial court's instruction to disregard Overbey's admission that

---

[1] It should be noted that in computing the sentencing guidelines level in this case the trial court expressly rejected the Government's request for a two-level increase on the grounds of obstruction of justice (perjury) in connection with Officer Couch's testimony at trial. Appendix at 193. This point establishes that Officer Couch's testimony cannot be rejected out of hand. Thus, the jury was entitled to hear and to consider Officer Couch's testimony in conjunction with and in light of Overbey's factual admission that he attempted to harm Officer Couch.

he attempted to assault Officer Couch "substantially and injuriously" affected the verdict on count one resulting in prejudice to Officer Couch. *Dutton*, No. 94-6064 at WL 128700 *5. Even more so, under the appropriate *Chapman* harmless-error standard for direct appeal, it is impossible to declare that the instruction was harmless beyond a reasonable doubt regarding Couch's defense to count one that he was merely reacting to Overbey's assault and resistance to arrest.

2. Couch's Use of Reasonable Force

A second but equally compelling reason why the trial court's instruction cannot be declared harmless error with respect to count one is that the trial court's instruction to disregard Overbey's admission precluded the jury from meaningfully evaluating the trial court's instructions governing the reasonable use of force. The jury was told by the trial court that in evaluating the reasonableness of the force applied by Officer Couch against Overbey, it may look to such factors as: (1) whether, at the time of his arrest, Overbey posed an immediate threat to the safety of the defendants or to the other officers; (2) whether Overbey was resisting arrest; (3) whether Overbey was restrained; (4) whether there was a need for the application of force; and (5) whether force was applied in good faith. Appendix at 082-083.

Evidence of Overbey's admission that he attempted to assault Officer Couch is obviously and indisputably material to virtually each and every one of those factors for reasonable force. This Court's analysis and approval of the reasonable force instruction given in this case demonstrates the link between the erroneous instruction on the no contest plea and Officer Couch's conviction on count one of the indictment. This Court

concluded that "the district court took pains to require that the jury evaluate the incident in a context-sensitive manner." *Couch*, No. 94-3292 at 8-9. However, because the jury was instructed not to consider the fact of Overbey's admission of his illegal actions toward Officer Couch, the jury was prevented from evaluating the incident in its true and complete factual context. It cannot be doubted that evidence that Overbey attempted to assault Officer Couch informs each of the factors of reasonable force that the trial court provided to the jury as the road map for determining Officer Couch's guilt or innocence under count one.

3. Andrews' Credibility

Finally, the trial court's erroneous instruction had the effect of enhancing Andrews' credibility and diminishing that of Officer Couch. Andrews testified that there was no factual basis of the criminal charges that were lodged against Overbey by Officer Couch. Andrews denied observing Overbey do anything to provoke Officer couch's use of force. Appendix at 266. Overbey's admissions, if they do not directly contradict Andrews' testimony, supply powerful corroborating evidence of the veracity of the facts offered by Officer Couch. The government's case relied extensively on the credibility of Andrews, who unequivocally denied any factual basis for the criminal charges the Officer Couch brought against Overbey. It is inconceivable, therefore, that the trial court's instruction on the no contest plea did not deprive the jury of critical evidence that struck directly at the center of the government's case against Officer Couch. Nevertheless, in failing to reverse the conviction on count one this Court overlooked the impact of this error on the jury's assessment of Couch's guilt to the first count of the indictment.

III. CONCLUSION

The trial court's error went to the heart of Officer Couch's defense to both count one and two. The standard for harmless error is whether the government can prove that the error was harmless beyond a reasonable doubt – not whether the error deprived the defendant of a "complete defense." The government cannot sustain its burden that the error was harmless because the incorrect jury instruction deprived Couch of his defenses to count one that: (1) Overbey committed assault and resisted arrest when Officer Couch used force against him; (2) Couch used reasonable force against Overbey; (3) Andrews' credibility was poor.

Accordingly, Petitioner respectfully requests that this Court make a final disposition of the cause by reversing the conviction on count one and remanding the matter to the district court for further proceedings. In the alternative, Petitioner requests that this Court restore this matter to the calendar for reargument or resubmission with respect to the issue of harmless error, vel non, in connection with count one.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two (2) copies of the foregoing Motion of Appellant were sent by regular U.S. mail to the offices of Lisa J. Stark, Assistant United States Attorney, U.S. Department of Justice, Civil Rights Division, Appellate Section, P.O. Box 66078, Washington, D.C., this 30th Day of June, 1995.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 94-3292

UNITED STATES OF AMERICA,	)	
	)	DISTRICT COURT
	)	NO. CR-1-93-033
Plaintiff-Appellee,	)	
	)	ON APPEAL FROM
v.	)	THE UNITED
	)	STATES DISTRICT
ROBERT COUCH,	)	COURT FOR THE
	)	SOUTHERN
Defendant-Appellant.	)	DISTRICT OF OHIO
	)	(Hon. S. Arthur Spiegel)

APPELLANT'S ADDENDUM NO. 1

United States v. Couch, No. 94-3292 (6th Cir. June 20, 1995)

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 94-3292

UNITED STATES OF AMERICA,	)	
	)	DISTRICT COURT
	)	NO. CR-1-93-033
Plaintiff-Appellee,	)	
	)	ON APPEAL FROM
v.	)	THE UNITED
	)	STATES DISTRICT
ROBERT COUCH,	)	COURT FOR THE
	)	SOUTHERN
Defendant-Appellant.	)	DISTRICT OF OHIO
	)	(Hon. S. Arthur Spiegel)

APPELLANT'S ADDENDUM NO. 2

Houston v. Dutton, No. 94-6064 (6th Cir. March 28, 1995) WL 128700

Respectfully submitted,

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Fed. Rptr., 39-48 F.3d 1995 WL 128700, Richard Houston v. Michael Dutton, Warden, Tennessee State Penitentiary,, (C.A.6 (Tenn.) 1995)

Page 1995 WL 128700 follows

Richard HOUSTON, Petitioner-Appellee,
v.
Michael DUTTON, Warden, Tennessee State Penitentiary,
Respondent-Appellant.

No. 94-6064.
United States Court of Appeals.
Sixth Circuit.
Argued Feb. 1, 1995.
Decided March 28, 1995.

Defendant was convicted in the Criminal Court, Knox County, Richard R. Ford, J., of robbery by use of deadly weapon and first-degree murder, with his punishment on murder charge fixed at death, and he appealed. The Tennessee Supreme Court, Cooper, J., 593 S.W.2d 267, affirmed. Defendant petitioned for writ of habeas corpus. The United States District Court for the Middle District of Tennessee, John T. Nixon, Chief Judge, issued writ, and appeal was taken. The Court of Appeals, Merritt, Chief Judge, held that: (1) defendant was entitled to habeas relief on ground that trial court's instruction, given at sentencing phase, that jury should impose death penalty if it found crime to be heinous, atrocious, or cruel was unconstitutional in that it was too vague and uninformative to properly guide jury, and (2) prosecution's comments in closing argument allegedly referring to defendant's failure to testify and his shackling during part of armed robbery trial did not have

substantial and injurious effect or influence upon jury's deliberations concerning defendant's guilt of armed robbery and thus, he was not entitled to habeas relief with respect to armed robbery conviction.

Vacated in part; affirmed in part and remanded.

1. HABEAS CORPUS k493(2)
   197 —
   197II Grounds for Relief; Illegality of Restraint
   197II(B) Particular Defects and Authority For Detention in General
   197k489 Evidence
   197k493 Weight and Sufficiency
   197k493(2) Federal review of state proceedings, in general.

C.A.6 (Tenn.) 1995.

Where sufficiency of the evidence is challenged, relevant question is whether, after viewing evidence in light most favorable to the prosecution, any rational trier of fact could have found essential elements of the crime beyond reasonable doubt.

2. HOMICIDE k232
   203 —
   203VII Evidence
   203VII(E) Weight and Sufficiency

Fed. Rptr., 39-48 F.3d 1995 WL 128700, Richard Houston v. Michael Dutton, Warden, Tennessee State Penitentiary,, (C.A.6 (Tenn.) 1995)

203k232 Deliberation and premeditation.

C.A.6 (Tenn.) 1995.

Evidence indicated that habeas petitioner deliberately and premeditatedly killed victim so as to support first-degree murder conviction under Tennessee law; each of the victim's three wounds hit areas of the body likely to produce death, witness saw defendant walk calmly away from the area of the shooting, and petitioner's calm demeanor after shooting could be inferred from testimony that he went back to his hotel, reloaded gun, drank, took shower, and then went out for dinner.

3. HABEAS CORPUS k453
197 —
197II Grounds for Relief; Illegality of Restraint
197II(A) Ground and Nature of Restraint
197k450 Federal Review of State or Territorial Cases
197k453 Questions of local law.

C.A.6 (Tenn.) 1995.

When and how state law applies to particular case is matter on which state Supreme Court has the last word.

4. HABEAS CORPUS k453

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Fed. Rptr., 39-48 F.3d 1995 WL 128700, Richard Houston v. Michael Dutton, Warden, Tennessee State Penitentiary,, (C.A.6 (Tenn.) 1995)

197 –
197II Grounds for Relief; Illegality of Restraint
197II(A) Ground and Nature of Restraint
197k450 Federal Review of State or Territorial Cases
197k453 Questions of local law.

C.A.6 (Tenn.) 1995.

No federal issues are implicated and no federal question is presented in determining whether change in state law is to be applied retroactively for purposes of federal habeas corpus relief.

5. CRIMINAL LAW k769
110 –
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k769 Duty of judge in general.

C.A.6 (Tenn.) 1995.

Instructions should guide jury's deliberations and are not mere technicalities in the legal system for errors in such matters may go to heart of the question of guilt.

6. CRIMINAL LAW k778(5)
110 –

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Fed. Rptr., 39-48 F.3d 1995 WL 128700, Richard Houston v. Michael Dutton, Warden, Tennessee State Penitentiary,, (C.A.6 (Tenn.) 1995)

110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k778 Presumptions and Burden of Proof
110k778(5) Shifting burden of proof.

C.A.6 (Tenn.) 1995.

It is unconstitutional to shift burden of proving element of crime to defendant.

7. CRIMINAL LAW k778(5)
110 —
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k778 Presumptions and Burden of Proof
110k778(5) Shifting burden of proof.

[See headnote text below]

7. HABEAS CORPUS k498
197 —
197II Grounds for Relief; Illegality of Restraint
197II(B) Particular Defects and Authority For Detention in General
197k498 Instructions

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Fed. Rptr., 39-48 F.3d 1995 WL 128700, Richard Houston v. Michael Dutton, Warden, Tennessee State Penitentiary,, (C.A.6 (Tenn.) 1995)

C.A.6 (Tenn.) 1995.

State trial court's error in giving unconstitutional jury instruction telling itself and use of gun was harmful and thus, petitioner was entitled to habeas relief; instruction essentially told jury to reject petitioner's claim that shooting was accidental and thus, by destroying petitioner's theory of accident at the outset, instruction substantially and injuriously affected verdict, resulting in prejudice to petitioner.

8. CRIMINAL LAW k1208.1(5)
110 —
110XXVI Punishment of Crime
110k1208 Extent of Punishment in General
110k1208.1 In General
110k1208.1(4) Death Sentence
110k1208.1(5) Aggravating or mitigating Circumstances

C.A.6 (Tenn.) 1995.

Tennessee is a weighing state, that is, jury determines whether any aggravating circumstances in capital murder case have been established beyond reasonable doubt by the state and then balances this against any mitigating circumstances found by the individual jurors and if jury unanimously finds that aggravators outweigh mitigators, death must be imposed.

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Fed. Rptr., 39-48 F.3d 1995 WL 128700, Richard Houston v. Michael Dutton, Warden, Tennessee State Penitentiary,, (C.A.6 (Tenn.) 1995)

9. HABEAS CORPUS k498
197 –
197II Grounds for Relief; Illegality of Restraint
197II(B) Particular Defects and Authority for Detention in General
197k498 Instructions.

[See headnote text below]

C.A.6 (Tenn.) 1995.

Petitioner was entitled to writ of habeas corpus on ground that state trial court's instruction, given at sentencing phase of capital murder prosecution, that jury should impose death penalty if it found crime to be heinous, atrocious, or cruel was unconstitutional because it was too vague and uninformative to properly guide jury; state courts in Tennessee had not found instruction to constitute error and, therefore, had not performed new sentencing calculus which was remedy for such constitutional violation.

10. HABEAS CORPUS k497
197 –
197II Grounds for Relief; Illegality of Restraint
197II(B) Particular Defects and Authority for Detention in General
197k497 Prosecutorial and police misconduct; argument.

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C.A.6 (Tenn.) 1995.

Prosecutor's comments in closing argument allegedly referring to habeas petitioner's failure to testify and his shackling during part of state trial did not have substantial and injurious effect or influence upon jury's deliberation concerning petitioner's guilt of crime because petitioner's role in the armed robbery was basically undisputed and thus, petitioner was not entitled to habeas relief.

11. HABEAS CORPUS k450.1
197 –
197II Grounds for Relief; Illegality of Restraint
197II(A) Ground and Nature of Restraint
197k450 Federal Review of State or Territorial Cases
197k450.1 In general.

C.A.6 (Tenn.) 1995.

Whether error had substantial and injurious effect or influence upon jury's verdict is the standard for habeas relief.

Henry A. Martin, Fed. Public Defender, Federal Public Defender's Office, Nashville, TN, James S. Liebman (argued and briefed), Columbia University School of Law, New York City, and Mark E. Olive,

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Tallahassee, FL, for petitioner-appellee.

Gordon W. Smith (briefed), Kathy Morante, Asst. Attys. Gen. Charles W. Burson, Atty. Gen., Glenn R. Pruden, Michael Moore (argued and briefed), and Brent Horst (briefed), Office of the Atty. Gen., Nashville, TN, for respondent-appellant.

Before: MERRITT, Chief Judge; GUY and RYAN, Circuit Judges.

MERRITT, Chief Judge.

Page 1995 WL 128700 *1 follows

In this Tennessee death penalty case, the District Court issued a writ of habeas corpus in favor of petitioner Houston, finding seven separate constitutional grounds for setting aside Houston's first degree murder conviction, death sentence, and armed robbery conviction. We uphold the writ two of the grounds, disagree with the District Court on one of the grounds, pretermit the State's remaining four assignments of error, and reinstate the armed robbery conviction.

The State concedes that the trial court in Knoxville erred in two respects relating to the constitutional requirements of first degree capital murder but should "Presume malice" (a key element of first degree murder)

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from the killing itself and the use of a gun – neither of which was disputed – the state trial court violated the rule of *Sandstrom v. Montana*, 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979) (presumptions that shift burden from State to defendant in criminal proceeding unconstitutional); *Francis v. Franklin*, 471 U.S. 307, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985) (mandatory rebuttable presumption of malice instruction unconstitutional because it shifts burden from State to defendant) and *Yates v. Evatt*, 500 U.S. 391, 111 S. Ct. 1884, 114 L. Ed. 2d 432 (1991) (courts not to assume such mandatory rebuttable presumptions are harmless error). Second, by instructing the jury at the sentencing hearing that it should impose the death penalty if it should find the crime to be "heinous, atrocious or cruel" (and not outweighed by any mitigating circumstance), the state trial court violated another line of cases holding that such an instruction is too vague, and uninformative to properly guide the jury in reaching a death verdict. *Maynard v. Cartwright*, 486 U.S. 356, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988) (Oklahoma's "heinous, atrocious or cruel" aggravating circumstance too vague to constitutionally channel jury's discretion to impose death penalty); *Richmond v. Lewis*, ___ U.S. ___, 113 S. Ct. 528, 121 L. Ed. 2d 411 (1992) (unconstitutional "heinous, atrocious or cruel" aggravator taints sentencing process and requires remand to state court for resentencing).

These two constitutionally invalid instructions

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require the habeas corpus remedy as ordered by the District Court for the reasons outlined below. The District Court erred, however, in its finding that the evidence of first degree murder offered by the State was insufficient under the Due Process Clause to justify a rational jury in making such a finding. We will discuss the sufficiency of the evidence point first and then the two erroneous instruction before concluding with a section holding that the District Court erred in setting aside the armed robbery conviction.

I. THE SUFFICIENCY OF THE EVIDENCE UNDER *JACKSON v. VIRGINIA*

[1]] [2] As one of the grounds in support of granting Houston's habeas petition, the District Court found insufficient evidence of premeditation and deliberation to sustain a finding of first-degree murder under Tennessee law. Where the sufficiency of the evidence is challenged, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential element of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979).

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The evidence is strong, indeed practically

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undisputed, that Houston, during the course of a robbery, killed the owner of a Knoxville gas station in the bathroom at the rear of the gas station. Houston's sole defense at trial was that the killing was an accident that occurred during the course of a struggle over the gun used in the robbery. Although it is possible that the killing could have occurred as the defendant stated in his confession, the circumstantial evidence supports an inference of premeditation and deliberation.

The evidence supports the following propositions of fact. Houston approaches Stanley Balsinger's Gulf station in Knoxville with a loaded .38 caliber revolver. That weapon killed Balsinger, an unarmed victim. Each of the victim's three wounds hit areas of the body likely to produce death – the face, the heart, and the vital organs of the mid-section. Although there is conflicting testimony in the record regarding the existence of powder burns on the mouth wound, the state's pathologist said that there were no such burns on the mouth. This supports an inference that the mouth wound was inflicted first from a distance. The evidence indicates that the face wound was not fatal, but would certainly have incapacitated Balsinger, rendering him helpless. The powder burns around the two other wounds to the heart and mid-section indicate that the shots were fired at point-blank range. In contrast to Houston's testimony that he ran away from the shooting after an extended struggle, Kenneth Hill, a witness who

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did not see or hear the shots, testified that he watched Houston walk calmly away from the area of the service station restroom back to his car. The defendant's calm demeanor after the shooting can be inferred from the testimony that he went back to his hotel room, deliberately reloaded his gun, had three beers, took a shower, attempted to destroy the evidence of the crime by washing away the victim's blood from his stained clothing, asked his girlfriend for sex, and then went out for dinner, driving by the murder scene on his way to Kentucky Fried Chicken to see whether there was any police activity. When viewed as a whole, the defendant's activities after the murder further support an inference that he premeditated and deliberated about killing Stanley Balsinger after robbing him. They allow the jury to reject the defendant's theory that this was a spur of the moment robbery which ended in an extended, deadly struggle over a gun.

Under Jackson, the entire record is to be reviewed and all reasonable inferences must be drawn in favor of the State. From these circumstances, a rational fact finder could have inferred beyond a reasonable doubt that Houston notwithstanding testimony that the gun accidentally went off in a scuffle, thought about killing Balsinger in advance and did in fact do so after robbing him. Under the standards accepted in Tennessee in 1980, Houston had sufficient time to premeditate and deliberate about the killing of Stanley Balsinger. The

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evidence, viewed in the light most favorable to the State, is sufficient to allow a rational jury to find that Houston deliberately and premeditatedly killed Stanley Balsinger in order to eliminate the only eyewitness to his crime.

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In *Houston v. State*, 593 S.W.2d 267 (Tenn.), *cert. denied*, 49 U.S. 891, 10 S. Ct. 251, 66 L. Ed. 2d 117 (1980), the original state opinion in the direct appeal of this case, the majority affirmed Houston's conviction for first degree murder, finding explicitly that premeditation and deliberation could be inferred from the circumstances of the murder, including the evidence of multiple gunshot wounds. In *State v. Brown*, however, the Tennessee Supreme Court held that evidence of repeated blows was no longer sufficient evidence alone from which infer premeditation. The *Brown* Court explained that repeated blows "can be delivered in the heat of passion, with no design or reflection." 836 S.W.2d 530, 542 (Tenn. 1992). This holding is unsurprising because it is a rare killing where the only circumstantial evidence available is multiple gunshots. In *Bass v. State*, the Tennessee Supreme Court said:

> While willful killing with a deadly weapon is not a sufficient basis for an inference of premeditation and deliberation, it is seldom that the evidence in a case of

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> homicide is restricted to no more than these bare facts and it is commonly the case that the jurors have before them other circumstances from which they may infer the existence or the want of mental elements of premeditation and deliberation.

191 Tenn. 259, 231 S.W.2d 707, 711 (1950).

Citing *Brown*, the District Court held that under Tennessee law the mere fact that the victim had multiple gunshot wounds is an insufficient basis from which a jury may infer premeditation and deliberation. The District Court concluded that "[t]he State's evidence fell short as a matter of law of the constitutional minimum needed to convince a rational juror beyond a reasonable doubt that the killing was premeditated and deliberate." See Memorandum of Federal District Court, Joint Appendix at 1184. The District Court's holding, based on the constitutional insufficiency of the evidence at Houston's trial, if upheld, would mean that under normal circumstances a retrial of Houston for murder would be barred by the double jeopardy clause of the Fifth Amendment ("nor shall any person be subject for the same offence be twice put in jeopardy of life or limb".).

Brown, however, should not be applied this way in this federal habeas appeal. Although *Brown* discussed the

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precedent set in *Houston*, it did not overturn his conviction. It overruled *Houston* only "to the extent that the opinions in *Houston* and [*State v.*] *Martin* [702 S.W.2d 560 (Tenn. 1985)] can be read to hold otherwise. . . ." 836 S.W.2d at 543. This uncertain modification of state law leads us to the conclusion that the federal District Court erred when it applied *Brown* to set the federal standards for a sufficiency of the evidence analysis. As stated above, under the analysis in *Jackson v. Virginia* there is sufficient evidence in the record here beyond the bare fact of three shots to allow a rational juror to find beyond a reasonable doubt that the killing was premeditated and deliberate.

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[3] [4] Moreover, no Tennessee court to date has held that Houston's conviction must be reversed in light of *Brown*. Significantly, Houston applied for post-conviction relief in light of *Brown*. On November 24, 1992, he filed a Motion to Recall the Mandate in the Tennessee Supreme Court. In his brief in support of the motion, Houston argued that the court should review his case under the *Brown* standards and urged the court to modify his conviction to second degree murder. In an order dated March 11, 1993, the Tennessee Supreme Court found that this motion was without merit and refused to recall its mandate. When and how state law applies to a particular case is a matter on which the state

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supreme court has the last word. See *Estelle v. McGuire*, 502 U.S. 62, 67-68, 112 S. Ct. 475, 480, 116 L. Ed. 2d 385 (1991) ("We have stated many times that 'federal habeas corpus relief does not lie for errors of state law' . . . . [I]t is not the province of a federal habeas court to reexamine state court determinations on state law questions.") (citation omitted). No federal issues are implicated and no federal question is presented in determining whether a change in state law is to be applied retroactively.

II. THE PRESUMPTION OF MALICE INSTRUCTION

[5] The fact that the evidence was sufficient to allow a jury to convict, of course, does not end the matter. The judge's instructions to the jury as to the law and how the evidence should be assessed are crucial to a fair trial. They should guide the jury's deliberations and are not mere technicalities in our legal system. Errors in such matters may go to the heart of the question of guilt.

The trial judge gave the following instruction which the State concedes (as to the underlined portions) violates the rule of *Sandstrom v. Montana*, 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979), *Francis v. Franklin*, 471 U.S. 307, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985), and *Yates v. Evatt*, 500 U.S. 391, 111 S. Ct. 1884, 114 L. Ed. 2d 432 (1991), in that it shifts to the defendant the burden of disproving malice:

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> Malice is an essential ingredient of murder, and it may be either express or implied. Express malice is actual malice against the party slain. Implied malice is malice not against the slain, but malice in general, or that condition of mind which indicates a wicked, depraved, and malignant spirit, and a heart regardless of social duty and fatally bent on mischief.
>
> If the State proves beyond a reasonable doubt that a killing has occurred, it is presumed to be malicious unless rebutted by other facts and circumstances to the contrary.
>
> * * *
> * * *
>
> A deadly weapon is an instrument, which from the use made of it at the time, is likely to produce death or to do great bodily harm. The use of a deadly weapon by the party killing, when shown, raises a presumption of malice sufficient to sustain a charge of Second Degree Murder unless it is rebutted by other facts and circumstances to the contrary.

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> You should look to all the facts and circumstances developed by the evidence in this case to determine whether or not the State has proved beyond a reasonable doubt the existence of malice.

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T.T. 602-3

The same definition of malice was used in the charge to cover first and second degree murder. T.T. 598-603.

[6] In *Sandstrom* the Supreme Court held that such burden-shifting by presumption violates the Due Process Clause of the Constitution. 442 U.S. at 520, 99 S. Ct. at 247. It is unconstitutional to shift the burden of proving an element of a crime to the defendant. It lifts from the state the burden that it must bear, and then it puts the burden upon the accused, who constitutionally should not suffer under it: "[T]he Fourteenth Amendment's guarantees prohibit State from shifting to the defendant an element of the crime charged." *Sandstrom*, 442 U.S. at 527, 99 S. Ct. at 2461 (Rehnquist, J., concurring).

This concept was applied specifically to presumed malice instructions in *Francis v. Franklin*. The Court held

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that a mandatory rebuttable presumption violates the Due Process Clause. 471 U.S. at 317, 105 S. Ct. at 1972. In *Yates v. Evatt*, 500 U.S. 391, 111 S. Ct. 1884, 114 L. Ed. 2d 432 (1991), the Court again found a mandatory rebuttable presumption unconstitutional. As here, the instruction in that case told the jury to infer malice from either an unlawful act, like a killing, or from the use of a deadly weapon, and the Court warned that we should not assume that such unconstitutional instructions are harmless. 500 U.S. at 402, 111 S. Ct. at 1892.

Thus, the instruction in this case was unconstitutional, as the State has conceded, and we proceed to harmless error analysis under *Brecht v. Abrahamson*, ___ U.S. ___, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993) (the test for harmless error is whether it had a "substantial and injurious effect or influence" upon the jury) and *O'Neal v. McAninch*, ___ U.S. ___, 115 S. Ct. 992, ___ L. Ed. 2d ___(1995) ("grave doubt" about harmlessness of error to be resolved in favor of petitioner). (FN1) The defendant's theory of defense was that the killing occurred by accident as a result of a struggle over the gun, a theory inconsistent with malice. Accident was the only defense. In both law and common sense, accident and malice are conceptually incompatible. A "malicious accident" is an oxymoron. The instruction to presume malice from the unrefuted facts of an unlawful killing and the use of a deadly weapon essentially told the jury to reject petitioner's claim that

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the shooting was accidental. By thus destroying defendant's theory of accident at the outset, the malice instruction substantially and injuriously affected the verdict, resulting in prejudice to the defendant.

The State argues that this instruction was mere harmless error because the jury independently found premeditation, deliberation and willfulness, elements inconsistent with accident:

> Houston's jury was instructed on each of the elements of first-degree murder separately and was told that the State must prove each one of them beyond a reasonable doubt. Given these instructions, a juror could have "bootstrapped" the presumption of malice into findings of premeditation, deliberation and willfulness only by disregarding the instructions.

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State Reply Brief at 8 (emphasis in original). We agree with Houston's counter-argument that the malice instruction had the effect of telling the jury to presume

> that the killing was subjectively contemplated beforehand – and thus that

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> the killing was not accidental – [which] utterly wiped out Mr. Houston's single and, on the evidence, substantial accident defense. Because accident would have negated not only malice but also willfulness, premeditation, and deliberation, removing the accident defense unconstitutionally left Mr. Houston with no defense, and paved the way to a finding of all four mental elements.

Defendant's Supplemental Brief at 5 (emphasis in original). The instruction that the jury should presume that Houston had knowledge that death would follow his actions established not only malice but the initial intent or design element in premeditation, deliberation and willfulness.

[7] What also makes the instruction harmful is that it probably led the jury to accept the prosecutor's theory argued repeatedly and vigorously that Houston robbed the owner in the office of the gas station and then "marched" him around to the bathroom and "executed" him. This scenario is doubtful in light of evidence that the gas station was probably closed and locked before the robbery. Yet with the accident defense out of the case because of the presumption, the only theory left before the jury was the State's execution theory. The State's theory that Houston emptied the cash register in the

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office and then marched the victim to the bathroom is now in doubt, but the instruction that the jury should presume "express or implied malice" suggested to the jury that the State's theory was probably true. The prosecutor in closing argument used the presumption of malice effectively to include the other elements of first degree murder as well:

> [A]nybody that goes down there and arm robs a human being with a deadly weapon and then shoots them in whatever fashion is guilty of First Degree Murder, of premeditated, malicious, deliberate, willful, unlawful, premeditated murder.

T.T. 596. Thus, we believe the error was harmful, and the order of the District Court issuing the writ of habeas corpus on this ground is affirmed.

III. THE "HEINOUS, ATROCIOUS OR CRUEL" INSTRUCTION

[8] Tennessee is a "weighing" state – that is, the jury determines whether any aggravating circumstances have been established beyond a reasonable doubt by the State and then balances this against any mitigating circumstances found by the individual jurors. If the jury unanimously finds that the aggravators outweigh the mitigators, death must be imposed.

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In this case, the trial judge instructed the jury on aggravating circumstances in part:

> No death penalty shall be imposed but upon a unanimous finding by the jury that one or more of the following specified statutory aggravating circumstances have been proved on the trial and/or on the sentence hearing beyond a reasonable doubt:
>
> [ ] The murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind.

T.T. 683. This was the whole of the instruction given the jury regarding the "heinous, atrocious or cruel" aggravator, and the jury found this aggravator as a basis for the death penalty. Under the cases cited in the opening section of this opinion, this instruction was constitutional error, and the State conceded the instruction to be erroneous in this case.

[9] Even if there were no other error in this case, we could not allow the death sentence to stand. The remedy for such constitutional violations respecting aggravating circumstances is set out in *Richmond v. Lewis*, ___ U.S. ___, 113 S. Ct. 528, 121 L. Ed. 2d 411 (1992), a case directly in point. There the Arizona trial court gave

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a similar "especially heinous, cruel or depraved" instruction. The federal district court and the court of appeals denied relief and the Supreme Court reversed:

> Where the death sentence has been infected by a vague or otherwise constitutionally invalid aggravating factor, the state appellate court or some other state sentencer must actually perform a new sentencing calculus, if the sentence is to stand.
>
> * * *
> * * *

We reverse the judgment of the Court of Appeals and remand with instructions to return the case to the District Court to enter an order granting the petition for a writ of habeas corpus unless the State of Arizona with a reasonable period of time either corrects the constitutional error in petitioner's death sentence or vacates the sentence and imposes a lesser sentence consistent with law.

___ U.S. at ___, ___, 113 S. Ct. at 535, 537.

The State courts in Tennessee have not found this instruction to constitute error and therefore have not performed "a new sentencing calculus" in this case.

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Thus, the District Court was correct in its order issuing the writ of habeas corpus on this ground.

IV. THE ROBBERY CONVICTION

[10] The District Court also vacated petitioner's armed robbery conviction on two separate grounds: the prosecution's comments in closing argument which Houston claims make direct reference to his failure to testify and his shackling during a part of the trial. Assuming without deciding that the District Court correctly analyzed these claims, we decline to grant the writ of habeas corpus insofar as it applies to the armed robbery conviction because the errors were harmless.

[11] The District Court applied the harmless error standard set out in *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), which the Supreme Court has not held inapplicable to habeas petitions. *Brecht*, ___ U.S. at ___, 113 S. Ct. at 1721. The old *Chapman* standard calls upon the state to show beyond a reasonable doubt that an error did not affect the jury's deliberations. As noted previously, the proper standard now is whether the error had a "substantial and injurious effect or influence" upon the jury's verdict. *Id.* at ___, 113 S. Ct. at 1722.

It is clear in this case that these two alleged errors did not have a substantial and injurious effect or

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influence upon the jury's deliberations concerning the petitioner's guilt of armed robbery. Houston's role in the armed robbery was basically undisputed. His confession was fully corroborated by other evidence. The only "evidence" in this case supporting petitioner's innocence of the armed robbery charge should be reinstated, and the District Court's order issuing the writ on this ground is reversed.

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Accordingly, the order and judgment of the District Court issuing the writ of habeas corpus is vacated except as to the two grounds stated in Sections II and III of this opinion as to which the District Court is affirmed, and the case is remanded to the District Court for modification of its writ of habeas corpus as provided in this opinion.

FN1. In *O'Neal* the Supreme Court quoted with approval the following test of harmless error from the earlier case of *Kotteakos v. United States*, 328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed 1557 (1946):

> If, when all is said and done, the [court] is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand.... But if one cannot say, with fair assurance,

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> after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

328 U.S. at 764-5, 66 S. Ct. at 1248, quoted in *O'Neal*, ___ U.S. at ___, 115 S. Ct. at 995.

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APPENDIX J

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 94-3292

UNITED STATES OF AMERICA,	)	
	)	APPEAL FROM
Plaintiff-Appellee,	)	THE UNITED
	)	STATES DISTRICT
v.	)	COURT FOR THE
	)	SOUTHERN
ROBERT COUCH,	)	DISTRICT OF OHIO
	)	
Defendant-Appellant.	)	

RESPONSE OF THE UNITED STATES
TO DEFENDANT'S PETITION FOR REHEARING

This opposition is submitted pursuant to this Court's order requesting the United States to respond to defendant Couch's petition for rehearing.

STATEMENT

Defendant, a former police officer, was charged with using unreasonable force resulting in bodily injury during the arrest of Larry Overbey, in violation of 18

U.S.C. § 242 (Count One); and falsely arresting Overbey on charges of assault and resisting arrest, in violation of 18 U.S.C. § 242 (Count Two). Following a jury trial, he was found guilty of both counts.

Defendant appealed and argued, inter alia, that the district court erroneously instructed the jury regarding Overbey's "no contest" plea to attempted assault. This Court agreed. It ruled that the district court should have instructed that the jury "was entitled to weigh Overbey's willingness to admit the truth of those facts against his testimony that he entered his plea out of fear * * * for purposes of determining his guilt or innocence on the criminal charge." Slip op. at 13. It concluded that the instruction was harmless as to Count One "[b]ecause the admissions made by Overbey * * * [even] if deemed conclusive by the jury, would not constitute a complete defense with respect to defendant's use of unreasonable force." *Id.* at n.6. It held that reversal of Count Two was required since "the no contest plea goes to the hear of Couch's defense * * * for willfully filing criminal charges without probable cause." *Id.* at 13.

ARGUMENT

Defendant contends that this Court erred when it concluded that the instruction regarding Overbey's no contest plea was harmless as to Count One. Defendant's claim is without merit.

"A district court's refusal to deliver a requested instruction is reversible-error only if that instruction is (1) a correct statement of the law, (2) not substantially covered by the charge actually delivered to the jury, and (3) concerns a point so important in the trial that the failure to give it substantially impairs the defendant's

defense." *United States v. Wuliger*, 981 F.2d 1497, 1505 (6th Cir. 1992), *cert. denied*, 114 S. Ct. 1293 (1994), quoting *United States v. Williams*, 952 F.2d 1504, 1512 (6th Cir. 1991). See *United States v. Newcomb*, 6 F.3d 1129, 1133 (6th Cir. 1993). Cf. *United States v. Reifsteck*, 841 F.2d 701, 705 (6th Cir. 1988), quoting *United States v. Valenzuela-Bernal*, 458 U.S. 858, 8_2, (1982) (improper exclusion of evidence harmless error unless "'[t]he denial of the testimony * * * constitute[s] such an absence of * * * fairness' that it 'fatally infected the trial,'" that is, "the testimony must establish a reasonable doubt about guilt in light of the record in the case").[1] Applying this standard, it is obvious that this Court correctly concluded that the instruction regarding Overbey's plea was harmless as to Count One. That instruction did not substantially impair defendant's defense because: (1) the evidence was overwhelming; (2) defendant was able to present his version of what occurred; (3) the issue as to whether Overbey assaulted defendant was not crucial to his defense; (4) Overbey's conduct did not provide a legal justification for defendant's use of force; (5) the jury was allowed to hear evidence and defense counsel's argument regarding the significance of Overbey's plea; and (6) defendant's explanation as to what occurred was inherently incredible. In any event, the instruction

---

[1] Defendant argues (Br. 4-5) that this Court should reverse Count One unless the government demonstrates that the instruction regarding Overbey's plea "was harmless beyond a reasonable doubt." That standard is applied when "reviewing claims of constitutional error." *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1717 (1992). Because the instruction regarding Overbey's no contest plea does not involve an issue of constitutional dimension, that standard is inapplicable. In any event, as discussed, infra, the instruction is harmless beyond a reasonable doubt since it could not have affected the jury's finding that defendant knowingly used excessive force.

regarding Overbey's plea was harmless since the district court in fact directed the jury to consider Overbey's plea and conduct when assessing whether defendant's use of force was excessive.

A. First, the evidence overwhelmingly demonstrates that defendant knowingly used excessive force when he repeatedly struck Overbey on the head with his metal flashlight. Officers Andrews and Williams both testified that defendant struck Overbey several times on the head with his flashlight while Overbey was lying face down on the ground under control (Tr. 69, 71, 80, 151-152, 169-170, 214, 219, 226, 316, 335-336, 339, 349). Officer Williams described the beating as a "road kill" and demonstrated the "swinging motion" that was used to inflict the forceful blows (Tr. 335-336, 338-339).

The government also presented substantial evidence to corroborate the eyewitness testimony. Medical personnel stated that Overbey sustained at least four lacerations to the head, requiring in excess of 50 stitches, as well as multiple bruises to the back and shoulders (Tr. 397, 448-449, 588). A nurse and physician testified that Overbey stated that the police hit him in the head with a flashlight and pictures should be taken to document his injuries (Tr. 398-400, 403, 448, 451). A paramedic also described the atmosphere at the scene as "tense" and said that he did not receive an explanation as to what had occurred despite questioning officers three times (Tr. 421, 477-478).

The government also presented uncontradicted evidence detailing the amount of force a police officer may lawfully use while making an arrest (Tr. 193, 236-237, 973-975, 981). Defendant admitted that an officer may not "under any circumstances" strike a person in the head

with an object like a night stick (Tr. 975). He also acknowledged that an officer may use only the minimum amount of force necessary to effect an arrest and is entitled to administer blows to the head only as a "last resort" (Tr. 973-975, 981).

Second, the instruction regarding Overbey's no contest plea did not preclude defendant from presenting his defense as to Count One. He testified at trial and explained in great detail his version of the bearing. Defendant insisted that he: (1) never struck Overbey in the head; (2) hit Overbey only once and that was to the body after Overbey knocked him to the ground with his fist or elbow; (3) never struck Overbey while he was on the ground; and (4) never observed another officer hit Overbey (Tr. 964-965, 995, 997-999, 1000-1001, 1010). He also stated that he assumed Overbey's plea did not interfere with defendant's giving his version of what occurred or explaining that he did not strike Overbey as the government's evidence suggested. Cf. *United States v. Hanson*, 994 F.2d 403, 407 (7th Cir. 1993).

Third, contrary to defendant's claim (Br. 5-7), evidence regarding Overbey's plea was not crucial to his defense. That is because defendant, as noted, testified that he never hit Overbey in the head and that Overbey must have sustained his injuries when he fell to the pavement (Tr. 964-965, 1000, 1010). Thus, defendant's testimony, if believed, suggests that he was not guilty because he did not do the acts that constituted the offense – not that he was justified in striking Overbey on the head with his flashlight because he had been assaulted. That being so, the instruction pertaining to Overbey's plea could not have impaired defendant's defense. See, e.g., *United States v. Fingado*, 934 F.2d 1163,

1165 (10th Cir.), *cert. denied*, 502 U.S. 916 (1991).[2]

Fourth, even if Overbey assaulted defendant, his conduct does not provide a legal justification for defendant's actions. According to defendant's own testimony, Overbey did nothing more than push him to the ground with his elbow or fist as defendant went to grab him (Tr. 998, 964). That conduct does not entitle defendant to retaliate and strike Overbey repeatedly on the head with his flashlight. Rather, police regulations require defendant to use the minimum amount of force necessary to effect an arrest, administer blows to the head only as a "last resort," and that he never strike someone in the head with an object like a flashlight (Tr. 193, 236-237, 973-975, 981). Accordingly, this Court correctly concluded that the instruction was harmless as to Count One because "the admissions made by Overbey in the context of the no contest plea * * * [do] not constitute a complete defense with respect to defendant's use of unreasonable force." (Slip op. at 13 n. 6). See, e.g., *United States v. Carr*, 979 F.2d 51, 54 (5th Cir. 1992).

Fifth, the instruction regarding Overbey's plea was also not significant because the jury was allowed to hear

---

[2] Contrary to defendant's claim (Br. 7-8), *Houston v. Dutton*, 50 F.3d 381 (6th Cir. 1995), petition for cert. filed, 64 U.S.L.W. 3001 (U.S. Jun. 26, 1995) (No. 94-2111) does not dictate a contrary conclusion. In *Houston*, this Court held that a jury instruction that required the jury to presume malice and reject the defendant's theory of the case created constitutional error that was not harmless. Here, unlike in *Houston*, the instruction does not pertain to the elements of the offense, suggest anything about defendant's theory of the case, or require the jury to make any presumptions. Because the instruction regarding Overbey's plea merely relates to the admission of certain evidence, it does involve an error of constitutional magnitude.

extensive evidence and defense counsel's argument about the plea. The local prosecutor at Overbey's plea testified about the circumstances of the plea, including the fact that Overbey admitted that he attempted to assault defendant, that the trial judge found Overbey guilty of attempted assault, and that Overbey waived his right to trial and never alleged police brutality (Tr. 719, 726-727). A portion of the transcript of Overbey's plea proceeding was also introduced and blown-up as a large exhibit.

The court also allowed defense counsel to argue "any way you want" as to Overbey's no contest plea (Tr. 1262). During closing argument, he vigorously maintained that Overbey's no contest plea demonstrated that he was not a believable witness and that he had assaulted defendant. He argued (Tr. 1308 (emphasis added)):

> Well, the scene clears and Overbey is charged with various offenses. The range from a felony in Kentucky of wanton endangerment, to resisting arrest and assault in the City of Cincinnati. <u>This fellow, Overbey, hires a lawyer. This fellow, Overbey, goes to court with his lawyer. This fellow, Overbey, enters a plea of no contest to the charge that he attempted to commit bodily harm to Patrolman Robert Couch</u>.

Defense counsel also stressed that a jury need not look beyond Overbey's plea to conclude that he assaulted defendant (Tr. 1323-1324 (emphasis added)):

> No, this fellow, Overbey, with his lawyer goes to Court, like this. You remember Ms.

> Fennell's testimony, the prosecutor who came back from Virginia to testify. Do you remember Ms. Fennell and the testimony about what also goes on in Hamilton County Municipal Court. You remember hearing that the court although a little smaller, it has many of the appointments of this courtroom, including a judge in a black robe and a jury box where people can sit and listen to testimony. A place where you can file subpoenas and a place where lawyers can come and cross-examine. A place where a fellow like Larry Overbey, if he felt he had done nothing wrong, could have his day in Court. What did Larry Overbey do with his lawyer in the presence of Bob Couch? He entered a plea of no contest to the charge that he attempted to commit bodily harm against Patrolman Robert Couch. End of case. And I submit to you that this is the end of Larry Overbey and his credibility. The Government has the audacity and the gall to present Larry Overbey who, with his lawyer, in open court, enters a plea of no contest to the charge that he knowingly attempted to cause bodily harm to Patrolman Robert Couch. And then this fellow, Overbey, gets on the witness stand and takes an oath and says, "I never – I wouldn't hurt a fly, I was on the ground, I was compliant."

Defense counsel also referred to Overbey's plea to respond to the government's claim that a "code of silence" had motivated several officers to testify that they did not see what had occurred (Tr. 1325-1327):

> And I offer you to that if there is a code of silence or a pact of solidarity, a conspiracy * * * you also have to include the Cincinnati prosecutor's office, Ms. Fennell in this conspiracy of silence. She too was an officer of the Court. She too has a responsibility to see to it that truth and justice are served. She too was involved, according to this theory, because she accepted, on behalf of the City of Cincinnati, the plea of no contest of Overbey. But we don't stop there. You have to include Judge Donnellon of the Hamilton County Municipal Court because he presided over the hearing, or call it what you will, where Larry Overbey with Mr. Couch standing there with his attorney responds to the charge that he attempted to knowingly cause physical harm to Bob Couch by entering a plea of no contest. So include Judge Donnellon in this conspiracy. One more person I suggest needs to be included if there's a conspiracy, a code of silence, that's Overbey's lawyer. He's the one who entered the plea on behalf of his client in open court in the presence of Couch with the prosecutor there in front of the judge, knowing all the while that if his client was innocent they had a right to fight it. They had a right to subpoena every witness that came into this courtroom. That is the code of silence that we have here.

Furthermore, the instruction regarding Overbey's plea did not substantially impair defendant's defense

since the plea was very weak evidence that he actually assaulted defendant. Overbey pled to attempted assault and thus never admitted that he actually assaulted defendant. Moreover, because the United States was not a party or in privity with the local authorities at the plea proceedings, it can relitigate whether the assault occurred. See *Haring v. Prosise*, 462 U.S. 306, 313 (1983); *United States v. Lloyd*, 10 F.3d 1197, 1209 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1569 (1994).

In addition, defendant's version of what occurred was inherently incredible. Defendant testified that no officer struck Overbey on the head and that he assumed Overbey sustained his injuries when he fell and "hit his head on the pavement" (Tr. 966). This testimony is unbelievable given medical evidence that Overbey received more than 50 stitches to his head and had several bruises on his upper body (Tr. 397, 448-449, 588).

B. In any event, this Court should not reverse Count One since the instructions, taken as a whole, permitted the jury to consider Overbey's plea when determining whether defendant's use of force was excessive. During the final charge, the court acknowledged that the jury was entitled to evaluate the plea stating that "[y]ou have been permitted to consider the fact that Mr. Overbey plead no contest to the attempted assault and resisting arrest charges" (App. 91).

The court also directed the jury to consider Overbey's conduct and the offenses with which he had been charged when evaluating whether defendant's use of force was reasonable. It told the jury to evaluate various factors, including "the severity of the crime of which Larry Overbey was suspected * * *; whether * * * Mr. Overbey posed an immediate threat to the safety of

defendant[] * * * [or] was resisting arrest or attempting to evade arrest by flight; [and] the need for the application of force" (App. 82). It also directed the jury to consider any "other factors that you deem relevant" (App. 83). Thus, the instructions highlighted that Overbey had been charged with various offenses and invited the jury to consider his plea, generally, as well as his conduct at the scene in evaluating whether defendant's use of force was reasonable.

Nor does the fact that the district court told the jury in the middle of the trial that "you're to draw no inferences from [Overbey's plea]" dictate a contrary conclusion (Tr. 649). This remark must be viewed under a plain error standard since defendant declined the court's invitation to help draft the instruction, did not object to it when it was given, and did not seek or propose a curative instruction (Tr. 562). *United states v. Salisbury*, 983 F.2d 1369, 1376 n.3 (6th Cir. 1993); *United States v. Denton*, 556 F.2d 811, 817 (6th Cir.), *cert. denied*, 434 U.S. 892 (1977). Moreover, it was an isolated comment that was not repeated during the final instructions. See *United States v. Mason*, 954 F.2d 219, 221 (4th Cir.), *cert. denied*, 504 U.S. 925 (1992). In any event, any misimpression created by the comment was corrected since the district court allowed the jury to hear extensive evidence about the plea, permitted defense counsel to argue inferences about that evidence, and directed the jury to consider the fact that Overbey had been charged with various offenses when determining whether defendant's use of force was reasonable. See, e.g., *United States v. Tipton*, 11 F.3d 602, 605-608 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 2692 (1994); *United States v. Warner*, 971 F.2d 1189, 1203 (6th Cir. 1992); *Hurt v. Coyne Cylinder Co.*, 956 F.2d 1319, 1327 (6th Cir. 1992).

CONCLUSION

Defendant's conviction and sentence on Count One should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 14, 1995, a copy of the Response of the United States to Defendant's Petition for Rehearing was served by first-class mail, postage prepaid, on the following counsel of record.

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APPENDIX K

Fed. Rptr., 7-88 F.3d 38 F.3d 1216, *Lewis v. Jefferson County Police Dept.*, (C.A.6 (Ky.) 1994)

Page 38 F.3d 1216 follows

NOTICE: Sixth Circuit Rule 24© states that citation of unpublished dispositions is disfavored except for establishing res judicata, estoppel, or the law of the case and requires service of copies of cited unpublished dispositions of the Sixth Circuit.

(The decision of the Court is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter.)

Grunda LEWIS, individually,
as Mother, Next of Kin, and
Administratrix of the Estate of John Thomas Lewis, Jr.
Plaintiff-Appellant,
v.
JEFFERSON COUNTY POLICE DEPARTMENT;
Bobby Crouch; Leon E. Jones, Sr.; Larry Bush; Harvey I. Sloane; David L. Armstrong; Irvin G. Maze; Chris Gorman; Darryl T. Owens; Jefferson County, Kentucky,
Defendants-Appellees.

No. 93-6287.
United States Court of Appeals,
Sixth Circuit.
Oct. 21, 1994.

Fed. Rptr., 7-38 F.3d 38 F.3d 1216, *Lewis v. Jefferson County Police Dept.*, (C.A.6 (Ky..) 1994)

On Appeal from the United States District Court for the Western District of Kentucky, No. 90-00687; Edward H. Johnstone, District Judge.

W.D. Ky..

Affirmed.

BEFORE: GUY and BATCHELDER, Circuit Judges; and McCalla, District Judge. (FN*)

PER CURIAM.

John Thomas Lewis, Jr., was shot and killed by a Jefferson County, Kentucky, police officer. Plaintiff, the mother of Lewis, brought this civil rights action against the officer as well as the municipality and some of its officials. The district court granted summary judgment in favor of defendants, dismissing plaintiff's state and federal claims. For the following reasons, we affirm.

I.

On November 20, 1989, a Pizza Hut restaurant in Louisville, Kentucky, received a phone-in order from an individual who identified himself as "John Jones." This individual asked that his order be delivered to the Robinwood section of Louisville. Claiming that he did not have a phone, the individual did not provide a phone number. Upon arriving at the designated location, the

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Pizza Hut employee who delivered the order, instead of meeting John Jones, was confronted by two black males, who robbed the employee at gunpoint using what appeared to be an assault rifle. The robbery, which netted the robbers the employee's wallet and the cash he had on hand, was reported to the Jefferson County Police Department ("JCPD").

The following evening the same Pizza Hut restaurant received a phone-in order from a "John Jones" who claimed not to have a phone. This John Jones, whose voice matched that of the John Jones of the night before, requested that his order be delivered to an address near the location at which the previous night's robbery had occurred.

The restaurant responded to the order by contacting the JCPD, which, in turn, quickly formulated a plan to capture the culprits. Devised by Sergeant Gerald Owen, the plan called for a police officer to pose as the deliveryman. This officer, it was hoped, would be able to make an arrest (with the assistance of other support officers) in the event he was held up during the course of the delivery. Other department detectives and officers, Larry Bush among them, were deployed in the area to help prevent an escape and otherwise assist the operation. A two-year veteran of the force, Bush was paired with detective Terry Jones, who was driving an unmarked police car. While Jones was wearing civilian clothes, Bush was in his uniform. In order that he not

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appear conspicuous, Bush was instructed to conceal his uniform while he rode in Jones's car.

While driving in the vicinity of the delivery location, Jones and Bush spotted an individual carrying what appeared to be a long gun. At his deposition, Bush explained: "I saw running away from me in a west direction a black male wearing a red shirt, blue jeans. In his right hand he had a jacket which was draped over what appeared to be a long gun. You could see the stock sticking out on the back side." (App. 171.) Jones and Bush then received a radio transmission informing them that this individual had entered a nearby apartment building. Evidently, the JCPD aborted Owen's plan at this point "and the focus of the police shifted to locating this apparently armed individual."

Jones parked his car in a position where he and Bush could observe the building. Soon thereafter, they received another radio transmission notifying them that an individual – who apparently was not carrying a rifle or any object resembling a rifle – had exited the building and was running in the direction of a parked car. Jones and Bush observed this individual get into that car. Bush believed this individual was the man he and Jones had seen moments earlier.

While Jones and Bush converged on the parked car from one direction, Owen, in a separate vehicle, came from another direction. Both vehicles were flashing their

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police lights. The officers exited their vehicles and approached the car. Bush determined that there were three people inside the car and that these people were behaving somewhat suspiciously. As he recounted, "there was a lot of exaggerated head movement[]" and "all this head bobbing. . . . [I]t was as if they were reaching down in the seat or putting something underneath the seat or grabbing something from underneath the seat." (App. 197).

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During his deposition, Bush offered the following account of the events that transpired next. Bush drew his weapon and ordered the occupants of the car to "hold it right there." (App. 201.) Rather than heed Bush's command, the suspect – the same individual who had led the police to the car (and whom Bush had initially suspected of carrying a concealed rifle) – emerged from the right front seat of the car. The manner in which the suspect exited the car – sideways, as to conceal his front from Bush – led him (Bush) to assume that the suspect "was probably carrying a gun in his waistband." (App. 214.) Immediately upon exiting the car, the suspect attempted to flee the scene. Bush ordered the suspect to stop and repeated the order as he began to pursue the suspect. Both times Bush was ignored. According to Bush, a few seconds later, "I hear Sergeant Owens' voice say, shoot him. At the same time that voice was saying that, I saw the guy that I was chasing go from a pumping

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action with his arms to reaching to his waistline in front and turn on me as if he was trying to shoot me." (App. 223.) Bush then fired a single shot from a distance of approximately 10 yards into the right side of the suspect, fatally wounding him. The suspect was later identified as John Thomas Lewis, Jr.

The JCPD subsequently conducted an internal investigation into the shooting. As a result of this investigation, which determined that Bush used excessive force in violation of the department's standard operating procedures, Bush's employment with the department was terminated.

Plaintiff, Grunda Lewis, initiated the instant action in Kentucky state court. Her complaint listed several tort claims in addition to alleging violations of federal civil rights laws. Named as defendants were Bush, Jefferson County, the Jefferson County Police Department, and several of the county's past and current officials. With the exception of Bush, who was sued in his individual and official capacities, all county officials were sued in their official capacities only. The case was removed to federal court. Bush and the municipality filed separate answers and motions for summary judgment. Plaintiff, too, filed a motion for summary judgment. The district court referred the case to a magistrate judge, who recommended that the summary judgment motions of Bush and the municipality be granted. The district court adopted the magistrate judge's recommendations,

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thereby dismissing plaintiff's complaint. This appeal followed.

II.

We review a district court's grant of summary judgment de novo. *EEOC v. University of Detroit*, 904 F.2d 331, 334 (6th Cir. 1990). We examine the grant of summary judgment to determine "'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1310 (6th Cir. 1989). Although we must draw all justifiable inferences in favor of the non-moving party, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986), there must be a disagreement regarding an item of material fact. *Kochins v. Linden-Alimak, Inc.*, 799 F.2d 1128, 1133 (6th Cir. 1986). The evidence presented must be sufficient to permit the plaintiff to recover if it is accepted by the jury.

Plaintiff first takes issue with the district court's decision to grant Bush's summary judgment motion. (FN1) In this regard, plaintiff notes that Lewis had not committed a crime as of the time he was shot. Moreover, he was unarmed and surrounded by not only nine JCPD officers on the ground, but also a helicopter above. As such, plaintiff submits that Lewis could not have presented a threat of physical injury to Bush or anyone else. Plaintiff also observes that Bush was fired because

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of the JCPD's determination that his use of force was excessive.

Two Supreme Court cases are critical to plaintiff's argument. See *Graham v. Connor*, 490 U.S. 386 (1989); *Tennessee v. Garner*, 471 U.S. 1 (1985). In *Garner*, the Court held that "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." 471 U.S. at 11. See also *id.* at 8-9. (The question is "whether the totality of the circumstances justifie[s] a particular sort of . . . seizure."). (FN2) In Graham, the Court made clear that excessive force claims are evaluated under the "objective reasonableness" standard of the Fourth Amendment. The *Graham* Court stressed, however, that "'[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application[.]'" 490 U.S. at 396 (quoting *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)). Instead, "its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect possesses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.*

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In reviewing the district court's decision as to

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Bush, we are mindful of the following caveat, which the *Graham* Court attached to its discussion of "objective reasonableness":

> The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than the 20/20 vision of hindsight . . . . The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation.

Id. at 396-97. This court provided its own gloss on this aspect of the *Graham* decision in *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir.), *cert. denied*, 112 S. Ct. 1954 (1992):

> Thus, under *Graham*, we must avoid substituting our personal notions of proper police procedure for the instantaneous decision of the officer at the scene. We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. What constitutes "reasonable" action may seem quite

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> different to someone facing a possible assailant than to someone analyzing the question at leisure.

Judged against this backdrop, we are persuaded that Bush did not act unreasonably in shooting at Lewis under these circumstances. The chase that resulted in the shooting lasted approximately five seconds and required a reflex-like decision that, though regrettable in retrospect, was not unreasonable under the circumstances. Bush fired the shot that killed Lewis believing, reasonably in our estimation, that Lewis was in the process of turning around to fire at Bush. That Lewis clearly was not wielding a rifle at the time does not alter our conclusion; his suspicious behavior in the parked car just moments earlier gave Bush the impression that perhaps Lewis had obtained a handgun while in the car.

Also immaterial to our analysis is the fact that Lewis was surrounded by other police officers. See *Smith*, 954 F.2d at 347 ("The fact that the vehicle was "totally surrounded' by police does not change matters: had [the suspect] in fact retrieved a gun from his seat, he could have caused injury or death despite the presence of numerous police officers.") (quoting *Reese v. Anderson*, 926 F.2d 494, 501 (5th Cir. 1991)). Moreover, the disciplinary action taken against Bush by the JCPD in the aftermath of the shooting is not dispositive in plaintiff's favor. On this point, we have remarked:

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> Under Sec. 1983, the issue is whether [the officer] violated the Constitution, not whether he should be disciplined by the local police force. A city can certainly choose to hold its officers to a higher standard than that required by the Constitution without being subjected to increased liability under Sec. 1983. To hold that cities with strict policies commit more constitutional violations than those with lax policies would be an unwarranted extension of the law, as well as a violation of common sense.

Smith, 954 F.2d at 347-48.

In light of our determination that Bush acted reasonably under the circumstances, we need not address the failure-to-train claim plaintiff asserts against the municipality or the claims against the other defendants.

AFFIRMED.

FN* The Honorable Jon P. McCalla, United States District Court for the Western District of Tennessee, sitting by designation.

FN1. On this point, the magistrate judge concluded:

> [T]he court has considered the totality of

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> circumstances revealed by the body of uncontradicted material facts. The officers of the JCPD were investigating a robbery that had occurred the night before in which at least one firearm was brandished. The officers had every reason to believe that suspects in the parking lot might be armed. The actions of the decedent, John Thomas Lewis. Jr., could reasonably give rise to the suspicion that he was armed and not willing to submit to an investigatory stop by Officer Bush and his fellow officers. It is not relevant to our consideration of he issue before the Court that Mr. Lewis was later discovered to be unarmed. Likewise, it is of no import in our consideration of whether the constitutional rights of the deceased were violated or that the actions of Officer Bush may or may not have violated the policies and guidelines of the JCPD. . . . Officer Bush reasonably believed that the suspect was armed, that he was collecting a firearm from his waistband during the footchase, and that he was turning to confront the officer immediately before the shooting. Officer Bush was not unreasonable in forming the belief that Mr. Lewis posed an immediate and deadly threat to the officer. The tragic effects of the shooting on all persons

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> involved is not lost on the magistrate judge. That, however, cannot change the fact that Officer Bush must be found, based upon the totality of the circumstances, to have acted reasonably in using deadly force against the plaintiff's son.
>
> Because Officer Bush acted reasonably in the use of deadly force against Mr. Lewis, the latter's constitutional rights were not violated by the former.

(App. 45-46.)

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FN2. Although we cite to "fleeing felon" cases because they contain much of the law in the area, this is not a classic escape case scenario. Although the decedent was fleeing, he was not shot because of that fact or the risk he might present to others if not apprehended. This is more correctly analyzed as a case in which an officer felt his own life was suddenly at risk and we are called upon to evaluate the objective reasonableness of his response.

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Supreme Court, U.S.
FILED
JAN 25 1996

No. 95-662

In the Supreme Court of the United States

OCTOBER TERM, 1995

ROBERT COUCH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly determined that an error in the jury instructions was harmless.

2. Whether the district court correctly instructed the jury on the standard for determining whether a police officer has used unreasonable force.

3. Whether an appellate court has jurisdiction to review a district court's refusal to exercise its discretion to depart downward from the applicable Guidelines range.

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In the Supreme Court of the United States

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NO. 95-662

ROBERT COUCH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is unpublished, but the judgment is noted at 35 F.3d 171 (Table). The district court's order denying petitioner's motions for a new trial and acquittal (Pet. App. 21a-36a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 1995. A petition for rehearing was denied on July 25, 1995. Pet. App. 44a-45a. The petition for a writ of certiorari was filed on October 23, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Ohio, petitioner was convicted of willfully using unreasonable force in the arrest of Larry Overbey, in violation of 18 U.S.C. 242 (Count 1); and willfully filing false criminal charges against Overbey, in violation of 18 U.S.C. 242 (Count 2). Petitioner was sentenced to concurrent prison terms of 63 months on Count 1 and twelve months on Count 2. Pet. App. 39a. The court of appeals affirmed the conviction and sentence imposed under Count 1, and reversed and remanded the conviction and sentence under Count 2. *Id.* at 20a.

1. On August 12, 1989, Larry Overbey was driving his pick-up truck on an interstate highway in excess of the speed limit. Officer Andrews of the Covington, Kentucky, Police Department attempted to stop Overbey. Overbey refused to comply and led police on a high-speed chase before he finally pulled over. The chase involved several officers from the Covington Police Department, including petitioner. Andrews was the first officer on the scene. He approached the driver's side of the truck, grabbed Overbey by the arm, removed him from the truck, and ordered him to the ground. When Overbey complied, Andrews grabbed his hands and handcuffed his left wrist. Pet. App. 2a; Gov't C.A. Br. 4-5.

While Overbey was lying face down on the ground, petitioner struck him on the right side of the head several times with his metal flashlight. As Overbey reacted and began to get to his knees, Andrews struck him twice with the butt of his gun and once with his black jack. At least two other officers struck Overbey several times with their flashlights.

Andrews also sprayed mace in Overbey's face. When the paramedics arrived, Overbey was lying on the ground in a large pool of blood. Overbey was transported to a hospital, where he received more than 50 stitches to his head. Pet. App. 3a; Gov't C.A. Br. 5-6.

The same day, petitioner filed a complaint in Hamilton County Municipal Court charging Overbey with resisting arrest and assault. Overbey entered a no contest plea to a misdemeanor charge of attempted assault. Overbey testified at trial that he did not offer any resistance to the arrest and that he entered the plea out of fear that he would otherwise go to jail. Pet. App. 3a-4a.

2. The court of appeals affirmed the conviction and sentence under Count 1 and reversed and remanded the conviction and sentence under Count 2. Pet. App. 1a-20a. The court held that the district court had misconstrued Ohio law when it instructed the jury that "you may not draw the inference that Mr. Overbey * * * committed the acts charged by virtue of his plea of no contest in the state court." *Id.* at 11a-12a. The court determined that the erroneous instruction required reversal of petitioner's conviction for having filed false criminal charges against Overbey because the significance of Overbey's plea "goes to the heart of [petitioner's] defense" to that count. *Id.* at 15a. The court concluded that the erroneous instruction did not require reversal of petitioner's conviction for using unreasonable force, however, because "the admissions made by Overbey in the context of the no contest plea, if deemed conclusive by the jury, would not constitute a complete defense" to that count. *Id.* at 15a-16a n.6.

The court of appeals also rejected petitioner's contention that the district court's reasonable force

instruction was deficient because it did not include language tracking the statement in *Graham* v. *Connor*, 490 U.S. 386, 396-397 (1989), that "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." Pet. App. 9a-11a. The court held that "a judge does not commit error because he or she fails to use language contained in a request, so long as the instruction given is accurate and sufficient." *Id.* at 10a. Noting that "the district court took pains to require that the jury evaluate the incident in a context-sensitive manner," the court held that the instruction given by the court was accurate and sufficient. *Ibid.*

Finally, the court of appeals refused to review petitioner's claim that the district court abused its discretion in refusing to grant a downward departure from the applicable Guidelines range. Pet. App. 20a. The court explained that "this court does not review denial of a motion for downward departure as long as the sentence imposed was within the properly calculated guideline range." *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 12-17) that the court of appeals misapplied harmless error principles when it concluded that the error in the jury instructions concerning the relevance of Overbey's plea of no contest was harmless as to Count 1. That fact-bound contention is without merit.

When reviewing claims of constitutional error on direct appeal, the relevant inquiry is whether the

error is harmless beyond a reasonable doubt. *Chapman* v. *California*, 386 U.S. 18 (1967); see *Brecht* v. *Abrahamson*, 113 S. Ct. 1710, 1717 (1993). In contrast, when reviewing claims of nonconstitutional error on direct appeal, the relevant inquiry is whether the error "had substantial and injurious effect or influence in determining the jury's verdict." *Kotteakos* v. *United States*, 328 U.S. 750, 776 (1946). In this case, the court of appeals concluded that the district court misconstrued Ohio law when it instructed the jury that it could not infer that Overbey had committed attempted assault by virtue of his plea of no contest to that charge. Pet. App. 11a-16a. Because the weight that is given to a victim's plea of no contest under state law does not raise a constitutional issue, the *Kotteakos* standard is applicable here. See *Kotteakos*, 328 U.S. at 767-772, 774 (applying the standard announced in that case to an erroneous jury instruction concerning the scope of the conspiracy that the government sought to prove, a variance between the indictment and the proof, and misjoinder); see also *United States* v. *Lane*, 474 U.S. 438, 446, 449 (1986) (applying *Kotteakos* standard to misjoinder under Fed. R. Crim P. 8(b)); *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 256, 257-263 (1988) (applying *Kotteakos* standard to errors under Fed. R. Crim. P. 6).

Under the *Kotteakos* standard, the district court's instruction concerning Overbey's plea of no contest constituted harmless error. Petitioner had a full opportunity to develop evidence that Overbey assaulted him. Petitioner himself testified that Overbey pushed him to the ground. Pet. App. 2a. The local prosecutor testified concerning the circumstances surrounding Overbey's plea, including that Overbey

admitted having assaulted petitioner and that the trial judge found Overbey guilty of attempted assault. *Id.* at 107a. Petitioner's counsel repeatedly argued to the jury that Overbey's plea undermined the government's case. *Id.* at 109a-111a. And the district court instructed the jury that it could consider Overbey's plea in resolving the charges against petitioner. *Id.* at 11a. In those circumstances, the instruction challenged by petitioner could not have had a material effect on the jury's verdict.

That is particularly true because the question whether Overbey assaulted petitioner had only limited relevance on the count charging petitioner with willfully using unreasonable force. The government introduced overwhelming evidence, including eyewitness testimony from two officers, that petitioner struck Overbey several times in the head with his flashlight while Overbey lay face down on the ground. Pet. App. 106a. Even if Overbey had pushed petitioner to the ground beforehand, that would not have entitled petitioner to retaliate by repeatedly striking Overbey in the head with a flashlight while Overbey lay in a prone position. The court of appeals therefore correctly concluded that the district court's error in instructing the jury on the relevance of Overbey's plea of no contest was harmless.[1]

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[1] Petitioner contends (Pet. 13-14) that the court of appeals incorrectly shifted the burden of proof on the issue of harmless error from the government to him. That contention is without merit. The court of appeals' one sentence explanation of its harmless error conclusion does not address the burden of proof. Pet. App. 15a n.6. That is hardly surprising. As this Court explained in *O'Neal* v. *McAninch*, 115 S. Ct. 992, 994 (1995), "record review" ordinarily permits an appellate court to resolve the question whether an error affected the jury's ver-

2. Petitioner next contends (Pet. 17-20) that the jury instructions regarding reasonable force were erroneous because they did not include language tracking the statement in *Graham* v. *Connor*, 490 U.S. 386, 396-397 (1989), that "the calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." That contention is without merit.

In *Graham*, the Court held that an officer's use of force to effect an arrest must be evaluated from the perspective of a reasonable officer at the scene confronted with the same circumstances that the defendant faced. 490 U.S. at 396-397. The district court's instructions correctly stated the law under *Graham*. The court instructed the jury to judge petitioner's conduct "from the point of view of a reasonable officer on the scene of the charged event." Pet. App. 52a. The district court also detailed a series of factors that the jury should consider in making that determination. *Id.* at 52a-53a.[2] As the court of appeals

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dict without relying on the burden of proof. The fact that the government bears the burden of proving harmlessness is significant only in the "unusual" case in which the court is in equipoise as to the harmlessness of an error. *Ibid.* When, as in this case, a court concludes that an error was harmless without discussing the burden of proof, the most logical inference is that the court was not in equipoise on the issue and therefore had no need to consider which party bore the burden of proof.

[2] The instruction provided:

> [Y]ou may look to such factors as the severity of the crime of which Larry Overbey was suspected at the time of his arrest; whether, at the time of his arrest, Mr. Overbey

concluded, the district court "took pains to require that the jury evaluate the incident in a context-sensitive manner." *Id.* at 10a. Because the district court's instructions accurately stated the law under *Graham*, the district court was not required to include the specific language from *Graham* desired by petitioner. As this Court has held, "[o]nce the judge has made an accurate and correct charge, the extent of its amplification must rest largely in his discretion." *United States* v. *Bayer*, 331 U.S. 532, 536 (1947).

The courts of appeals that have addressed the question have uniformly agreed with the court's holding in this case that reasonable force instructions need not include the language from *Graham* sought by petitioner. See *United States* v. *Schatzle*, 901 F.2d 252, 254-255 (2d Cir. 1990) ("We cannot place the talismanic weight urged by [defendant] on *Graham*'s exact wording and do not believe the district court needed to echo the opinion paragraph by paragraph to convey adequately its import to the jury."); *Fikes* v.

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posed an immediate threat to the safety of the defendants or other police officers; whether, at the time of his arrest, Mr. Overbey was resisting arrest or attempting to evade arrest by flight; the need for the application of force; whether the victim was restrained; the victim's position in relation to where the defendants were located; the relationship between the need and the amount of force that was used; the extent of injury inflicted; the physical condition of the victim; and whether force was applied in good faith or for the very purpose of causing harm. You may also consider the character and duration of the alleged assault, and the manner in which the alleged assault occurred, and any other factors that you deem relevant.

Pet. App. 52a-53a.

Cleghorn, 47 F.3d 1011, 1013-1014 (9th Cir. 1995); *Jaffee* v. *Redmond*, 51 F.3d 1346, 1353-1354 (7th Cir.), cert. granted on other grounds, 116 S. Ct. 334 (1995). Review on that issue is therefore unwarranted.

3. Finally, petitioner contends (Pet. 20-21) that the district court abused its discretion in failing to depart from the applicable Guidelines range. As the court of appeals held, however, a district court's refusal to exercise its discretion to depart from the applicable Guidelines range is not appealable. Pet. App. 20a. That holding is consistent with the view of every other court of appeals.[3]

Contrary to petitioner's suggestion (Pet. 21), this case should not be held pending the outcome of *Koon* v. *United States* and *Powell* v. *United States*, cert. granted, Nos. 94-1664 & 94-8842 (Oct. 4, 1995). The petitions in those cases present the question "[w]hether a district court's downward departure from the prescribed range of the United States Sentencing Guidelines based upon factors not expressly

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[3] See, *e.g.*, *United States* v. *LeBlanc*, 24 F.3d 340, 348-349 (1st Cir.), cert. denied, 115 S. Ct. 250 (1994); *United States* v. *Colon*, 884 F.2d 1550, 1552-1556 (2d Cir.), cert. denied, 493 U.S. 998 (1989); *United States* v. *Price*, 13 F.3d 711, 736 (3d Cir.), cert. denied, 114 S. Ct. 1863 (1994); *United States* v. *Kimberlin*, 18 F.3d 1156, 1160 (4th Cir.), cert. denied, 114 S. Ct. 1857 (1994); *United States* v. *Aggarwal*, 17 F.3d 737, 745 (5th Cir. 1994); *United States* v. *Vincent*, 20 F.3d 229, 239 (6th Cir. 1994); *United States* v. *Braslawsky*, 913 F.2d 466, 467 (7th Cir. 1990); *United States* v. *Atkins*, 25 F.3d 1401, 1404-1405 (8th Cir.), cert. denied, 115 S. Ct. 371 (1994); *United States* v. *Jones*, 24 F.3d 1177, 1179 (9th Cir. 1994) (per curiam); *United States* v. *Rodriguez*, 30 F.3d 1318, 1319 (10th Cir. 1994); *United States* v. *Keller*, 916 F.2d 628, 637 (11th Cir. 1990), cert. denied, 499 U.S. 978 (1991); *United States* v. *Johnson*, 28 F.3d 151, 156 (D.C. Cir. 1994).

prohibited as grounds for departure is to be reviewed under the de novo standard * * * or under the deferential standard set forth in *United States* v. *Rivera*, 994 F.2d 942 (1st Cir. 1993), and other cases." 94-1664 Pet. i. The resolution of that issue has no bearing on whether a court of appeals has jurisdiction to review a district court's refusal to exercise its discretion to depart from the applicable Guidelines range.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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